

INTERNATIONAL ADJUDICATION AND CUSTOM BREAKING BY DOMESTIC COURTS

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ABSTRACT

This Essay identifies a fundamental but overlooked tension between international adjudication and the evolution of customary international law (CIL). According to the traditional understanding, the evolution of CIL requires one or more states to deviate from existing customary rules and engage in new conduct—a concept that I refer to as “custom breaking.” A deviation’s legal status is determined over time, as other states respond by deciding whether to follow the proposed break or adhere to the existing rule. Therefore, the deviation cannot be classified definitively as either legal or illegal at the time it occurs. During the period of state response, CIL necessarily contains some legal ambiguity and inconsistency. Because an important function of international adjudication involves resolving ambiguities in the law, a central tension emerges: international courts may be called upon to adjudicate a break with CIL before other states have had the opportunity to decide for themselves whether to follow the break. Given that most international courts will invalidate deviations from the status quo, international adjudication risks impeding the traditional process by which CIL evolves. More specifically, international adjudication of cases that involve custom breaking may have both a procedural and a substantive effect: procedurally, it may short-circuit state responses to the break with CIL, and substantively, it may deter states from following the custom breaker, even when the other states are not formally bound by the international judicial decision. To illustrate these constraining effects, this Essay discusses three departures by domestic courts from the foreign sovereign immunity rule. It concludes by proposing that in cases involving custom breaking, international courts should adopt, as Professor Cass Sunstein has argued for U.S. courts, a minimalist approach that

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produces narrow and shallow decisions. This judicial strategy would give states, including their domestic courts, the opportunity to determine for themselves whether a break with international custom is the beginning of a new legal rule.

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INTRODUCTION

In certain cases, international adjudication and the evolution of customary international law (CIL) are in profound tension. This tension stems from the role of international courts in resolving ambiguities in international law and the manner—widely recognized as paradoxical—by which CIL evolves. CIL is formed by general and consistent state practice that is followed out of a “sense of legal duty,” which is referred to as *opinio juris*.¹ In the traditional conception of CIL, which emphasizes state practice over *opinio juris*,² a state initiates a change in CIL by deviating from the existing widespread

1. North Sea Continental Shelf (W. Ger./Den.; W. Ger./Neth.), Judgment, 1969 I.C.J. 3, para. 77 (Feb. 20); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (“Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”).

2. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 758 (2001).

practice and engaging in new conduct. In this sense, the evolution of CIL requires its own breaking.³ At the time it occurs, the legal status of the break with CIL is uncertain.⁴ It is unclear whether the custom-breaking state is violating CIL or changing it.⁵ The legality of the deviation is determined by how other states respond—whether they decide to accept the proposed break with CIL or to adhere to the existing rules. At its heart, then, the evolutionary process of CIL requires not only a break from custom but also a period of uncertainty during which other states decide whether to follow course.

I argue that for a specific class of cases—those involving custom breaking—international adjudication risks impeding the traditional process by which CIL evolves. A central function of international courts is to resolve uncertainties and inconsistencies in the law. When confronted with a case that entails custom breaking, international courts will generally invalidate deviations and return customary law to the status quo, and they may do so before other states have had time to respond to the break. For some courts, the timing of adjudication is not in their control. Unlike the U.S. Supreme Court, the International Court of Justice (ICJ) does not have discretionary

3. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 212 (2010) (“The only way for nations to change a rule of CIL (as opposed to overriding it by treaty) is to violate the rule and hope that other nations accept the new practice.”); Joel P. Trachtman, *Persistent Objectors, Cooperation, and the Utility of Customary International Law*, 21 DUKE J. COMP. & INT’L L. 221, 223 (2010) (describing this feature as “one of the quirks of CIL”). Some legal scholars adopt a modern conception of CIL, however, which emphasizes *opinio juris* over state practice. The modern approach recognizes the possibility for CIL to change quickly, based on treaties and United Nations (UN) General Assembly resolutions, and therefore does not require its own breaking. See Roberts, *supra* note 2, at 758. For further discussion, see *infra* Part I.A.

4. “Custom breaking” is defined here as a state’s unilateral departure from widely accepted state practice.

5. See J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 450–51 (2000) (observing the difficulty in determining how and when CIL crystallizes). It is possible but unlikely that a court may find itself in a situation of *non-liquet*, in which a state is neither violating nor changing CIL, but instead creating it. As Judge Fitzmaurice notes, this possibility is rare: “In practice, courts hardly ever admit a *non-liquet*. As is well known, they adapt existing principles to meet new facts or situations.” Rosalyn Higgins, *Policy Considerations and the International Judicial Process*, 17 INT’L & COMP. L.Q. 58, 68 (1968) (quoting Gerald Fitzmaurice, *Judicial Innovation—Its Uses and Its Perils—As Exemplified in Some of the Work of the International Court of Justice During Lord McNair’s Period of Office*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 24, 24 (1965)).

jurisdiction.⁶ It cannot decline a case and wait for an issue to percolate—even though this is precisely what the evolutionary process of CIL traditionally requires. What this means is that international courts will adjudicate and invalidate breaks with custom before other states have had an opportunity to respond, engaging in what this Essay refers to as “preemptive” or “early” adjudication.⁷

My core claim is that early adjudication of a custom-breaking case may have two problematic effects. The first effect, and the primary focus of this Essay, is procedural. The determination of whether a deviation from CIL is a violation or “contains the seeds of a new rule”⁸ can be ascertained only by examining state responses to the deviation—not simply by examining the deviation itself. Yet international adjudication, when it occurs before other states have had the opportunity to respond, may short-circuit the entire state-response stage. This short-circuiting is problematic not because it prevents CIL from changing, but because it may inhibit states from

6. See Statute of the International Court of Justice art. 36(1), June 26, 1945, 59 Stat. 1055, 1060, 3 Bevens 1179, 1186 (“The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations[June 26, 1945, 59 Stat. 1031, 3 Bevens 1153.] or in treaties and conventions in force.”). *But see id.* art. 65, 59 Stat. at 1063, 3 Bevens at 1191 (authorizing jurisdictional discretion when issuing advisory opinions). This discretion extends only to advisory opinions. *See, e.g.,* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, para. 44 (July 9) (explaining that the ICJ has discretion to deny a request for an advisory opinion but has rarely exercised that power).

7. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (Congo v. Belgium)*, Judgment, 2002 I.C.J. 3 (Feb. 14), is an example of preemptive adjudication because states had little opportunity to respond before the ICJ issued its decision, *see infra* Part II.A. An example of a case that was not preemptive was a dispute between Singapore and Malaysia adjudicated by the ICJ. *See* Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.), Judgment, 2008 I.C.J. 12 (May 23). There, the ICJ evaluated whether, during the nineteenth century, Britain had established sovereignty over, although not formal title to, the island Pedra Branca in the Singapore Straits although it had not performed symbolic acts affirming its authority over the territory. *Id.* paras. 118–24. The ICJ determined that even though symbolic acts were common, they were not required by CIL because sovereignty could be established in other ways. *Id.* para. 149. This case was ripe for adjudication because other states, Malaysia included, had ample opportunity to respond to British control over the island in ways that would have at least implicitly entailed taking a position on whether Britain was required to engage in some form of symbolic act to establish its sovereignty over the territory. *See id.* para. 274 (“Malaysia and its predecessors did not respond in any way to [the United Kingdom and Singapore’s] conduct . . . of all of which . . . it [sic] had notice.”). For a discussion of this case, see Alberto Alvarez-Jiménez, *Methods for the Identification of Customary International Law in the International Court of Justice’s Jurisprudence: 2000–2009*, 60 INT’L & COMP. L.Q. 681, 697 (2011).

8. ANTHONY A. D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 98 (1971).

determining whether they want CIL to change. The second effect is more substantive: early adjudication by international courts risks deterring other states from following the custom breaker and may therefore prevent new and better rules from emerging. International judicial decisions can trigger these effects even if they formally bind only the two parties to the dispute.⁹ In this Essay I focus on a subset of cases:¹⁰ those that involve international adjudication in which the custom breaker is a domestic court. The effects of preemptive international adjudication may be particularly strong in this context because domestic courts seem more likely than executives or legislatures to defer to international judicial decisions, at least when these decisions do not conflict with domestic law or do not incite domestic opposition.¹¹

To be sure, international judicial review of domestic courts' treatment of CIL is relatively rare. Yet when such review does occur,

9. See *infra* Part I.C.

10. Domestic judicial interpretations of CIL are generally considered to be evidence of state practice. See, e.g., Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25) ("From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions . . ."); Philip M. Moremen, *National Court Decisions as State Practice: A Transjudicial Dialogue?*, 32 N.C. J. INT'L L. & COM. REG. 259, 278 (2006) ("The contemporary commentators who have addressed the status of national decisions are almost unanimous in their view that a national court deciding a case of international law engages in state practice."); Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57, 62 (2011) ("[N]ational court decisions on matters of international law are evidence of the practice of the forum State."). When domestic court interpretations are in conflict with interpretations of executive or legislative branches, the status of the court decision as CIL is debatable. See INT'L LAW ASS'N, LONDON CONFERENCE (2000), COMM. ON FORMATION OF CUSTOMARY (GEN.) INT'L LAW, FINAL REPORT OF THE COMMITTEE: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 18 cmt. e (2000), available at <http://www.ila-hq.org/download.cfm/docid/A709CDEB-92D6-4CFA-A61C4CA30217F376> ("It can happen . . . that the position of the judiciary (or of the legislature) conflicts with that of the executive. . . . In the ultimate analysis, since it is the executive which has primary responsibility for the conduct of foreign relations, that organ's formal position ought usually to be accorded more weight than conflicting positions of the legislature or the national courts."); Roberts, *supra*, at 62 ("Where inconsistencies emerge, the conflicting practice must be weighed, considering factors such as which branch of government has authority over the matter."); Ingrid Wuerth, *The Jurisdictional Immunities of the State Case, International Law in Domestic Courts, and the Executive Branch*, 13 MELB. J. INT'L L. (forthcoming 2012) (manuscript at 1–4, on file with the *Duke Law Journal*).

11. For an explanation of why, despite some salient exceptions, domestic courts may be inclined to follow the decisions of international and supranational courts, see *infra* Part II.B. Even if domestic courts are generally reluctant to defy an international judicial decision, state practice may still evolve if executives or legislatures engage in conduct that contradicts an international judicial decision. See Wuerth, *supra* note 10, (manuscript at 3).

it risks undermining the extent to which CIL is shaped by the decentralized, evolutionary practice of states—a fundamental element of CIL. International adjudication’s constraining effect is problematic not only for CIL, but also for international courts themselves, which are often directed to apply CIL. The Statute of the International Court of Justice,¹² for instance, identifies CIL as a primary source of law.¹³ By customary law’s own terms, a state’s response to a deviation from CIL—not simply the deviation itself—determines whether a break constitutes a violation or the beginning of a new rule. Yet, the ICJ’s review of custom-breaking cases may preempt the state-response stage. Even if the ICJ’s review overlaps with state responses, the court usually fails to distinguish between state practice that precedes the break and that which follows it, and it does not recognize the latter as warranting particular attention.¹⁴ ICJ adjudication of custom-breaking cases therefore not only risks impeding the evolutionary process of CIL but also undermining the court’s own mandate.

This Essay proceeds in three parts. Part I introduces CIL and its need for ambiguity and inconsistency in order to evolve. It then discusses the functions of international courts, particularly their role in clarifying legal rules and resolving ambiguities in the law. Finally, Part I argues that these virtuous functions become vices in the context of custom breaking; they may short-circuit the state-response stage in the evolution of CIL and also deter states from following a potentially improved rule. To illustrate the tension between international adjudication and the evolution of CIL, Part II turns to three cases involving some form of custom breaking by domestic courts in the context of the foreign sovereign immunity rule: *Arrest Warrant of 11 April 2000 (Congo v. Belgium)*,¹⁵ *Jurisdictional Immunities of the State (Germany v. Italy)*,¹⁶ and the *Pinochet* case.¹⁷ It argues that the ICJ preempted the state-response stage in the first two examples of

12. Statute of the International Court of Justice, *supra* note 6.

13. *See id.* art. 38(1)(b), 59 Stat. at 1060, 3 Bevens at 1187 (“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . international custom, as evidence of a general practice accepted as law . . .”).

14. *See infra* Part II.A–B.

15. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) (*Congo v. Belgium*), Judgment, 2002 I.C.J. 3 (Feb. 14).

16. Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening) (*Germany v. Italy*), Judgment (Feb. 3, 2012), <http://www.icj-cij.org/docket/files/143/16883.pdf>.

17. R v. Bow St. Metro. Stipendiary Magistrate, *Ex parte Pinochet Ugarte* (No. 3) (*Pinochet*), [2000] 1 A.C. 147 (H.L.).

judicial-led custom breaking and that the court may have further entrenched existing customary rules. It then argues that the absence of international judicial review in the third example has provided states with the opportunity to respond to the break with CIL. And although the traditional customary rule in this example appears to persist, observers can be more confident that this persistence reflects the decentralized preferences of states rather than a mandate from an international court. In this example, moreover, the door remains open to the future evolution of CIL. Finally, Part III proposes that international courts adopt a policy of judicial minimalism in specific types of custom-breaking cases, including cases in which the custom breakers are domestic courts.

I. A CENTRAL TENSION: THE EVOLUTION OF CUSTOMARY INTERNATIONAL LAW AND THE ROLE OF INTERNATIONAL ADJUDICATION

This Part first elaborates on the traditional conception of CIL, including the paradoxical process by which it evolves, and suggests that inconsistency and ambiguity are necessary for CIL to change. It then discusses the broader function of international adjudication, a function focused not only on settling disputes between parties but also on resolving ambiguities and eliminating inconsistencies in international law. This Part concludes by suggesting that when domestic courts break from the status quo, the clarifying function of international courts risks impeding the evolutionary dynamic of CIL—one state breaks, others respond—by both short-circuiting the state-response stage and inhibiting other states from following the custom breaker.

A. *The Traditional Customary International Law Process*

International law can take the form of treaties or custom. As noted earlier, CIL is composed of two elements: state practice and *opinio juris*.¹⁸ State practice is the objective element and refers to the general and consistent practices of states.¹⁹ *Opinio juris*, the subjective element, indicates that the practice is committed out of a sense of legal obligation.

18. Roberts, *supra* note 2, at 757; *see also supra* note 1 and accompanying text.

19. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); Roberts, *supra* note 2, at 757.

Until the early twentieth century, international law was primarily customary.²⁰ Rules governing the treatment of foreign property and conduct at sea, for instance, were rooted in state practice rather than in treaties. Over the course of the twentieth century, however, states codified most but not all areas of international law.²¹ For example, until the adoption of the Rome Statute,²² which established the International Criminal Court, prohibitions on crimes against humanity were found primarily in custom rather than in treaties.²³ Certain areas of law, such as state responsibility, diplomatic protection, and state immunity, continue to be regulated by customary rules instead of by treaties.²⁴ Even for areas that are heavily codified, however, CIL continues to be relevant. It influences the interpretation of treaty obligations, fills in treaty gaps, and binds states that have not ratified the relevant treaties.²⁵

Traditionally, CIL has evolved through the changing practice of states. Attempts to identify changing custom have therefore entailed examining inductively individual instances of state practice.²⁶ State practice is generally thought to consist of physical and verbal acts by

20. Bradley & Gulati, *supra* note 3, at 208.

21. *Id.*

22. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

23. See Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 129–30 (2008) (describing the source of law under which World War II war criminals were convicted, given the absence of an applicable treaty); see also Leila Nadya Sadat, *Preface and Acknowledgements* to FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY, at xix, xxii (Leila Nadya Sadat ed., 2011) (“With the adoption of the International Criminal Court (ICC) Statute in 1998, crimes against humanity were finally defined and enshrined in an international convention.”). Before the 1998 Rome Statute, the charters of the International Military Tribunals at Nuremberg and Tokyo both included provisions regarding crimes against humanity, as did the statutes establishing the International Criminal Tribunals for the former Yugoslavia and Rwanda. Sadat, *supra*, at xix, xxii.

24. Although the UN adopted a treaty regulating state immunity for certain types of conduct, it has not entered into force. See United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, art. 30, U.N. GAOR, 59th Sess., Supp. No. 49, U.N. Doc. A/RES/59/38, at 11 (Dec. 2, 2004) (providing that the convention would enter into force following deposit of the thirtieth instrument of ratification, acceptance, approval, or accession with the UN Secretary General); see also Rep. of the Int’l Law Comm’n, 50th Sess., Apr. 20–June 12, July 27–Aug. 14, 1998, para. 108(a), U.N. Doc. A/53/10; GAOR, 53d Sess., Supp. No. 10 (1998) (noting that states’ obligations are controlled by treaties and CIL and that “[t]he customary law approach to diplomatic protection should form the basis” of the UN’s analysis).

25. MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 3–4 (1999); Bradley & Gulati, *supra* note 3, at 209.

26. Roberts, *supra* note 2, at 758.

states.²⁷ A more recent definition of CIL and an approach for identifying it, referred to by Professor Anthea Roberts as “modern custom,” gives primary importance to *opinio juris*, which “relies primarily on statements rather than actions,” and is usually reflected in treaties and in international resolutions.²⁸ According to Roberts, this deductive approach allows CIL to develop more quickly.²⁹

This Essay adopts the traditional understanding of CIL. It assumes that for CIL to evolve, there must exist at least some evidence of changing state conduct. It further assumes that CIL cannot change simply through the negotiation of treaties and adoption of declarations in multilateral fora.³⁰ The distinction between traditional and modern CIL is important for this Essay because modern CIL does not evolve through the process of deviation and state response. International adjudication is therefore not in similar tension with modern CIL. In this Essay, I use CIL and “traditional CIL” interchangeably; both refer to the conventional approach for identifying CIL, which emphasizes the conduct of states.

A proclaimed virtue of traditional CIL is that it evolves without formal agreements among states.³¹ The decentralized and dynamic

27. Scholars as well as courts have disagreed sharply, however, about whether state practice is limited to “only action[s] and not words.” Susan Anderson, *When the Law Breaker Becomes the Law Maker*, in *THE CHALLENGE OF CONFLICT: INTERNATIONAL LAW RESPONDS* 413, 413–19 (Ustinia Dolgopol & Judith Gardam eds., 2006). More specifically, some scholars argue that treaties, declarations, or other promises about future conduct can constitute state practice. *Id.* at 419–20. Compare S.S. “Lotus” (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 18 (Sept. 7) (mentioning only actions and conventions as generally accepted expressions of principles of international law), with *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, paras. 64–65 (June 27) (finding that statements by representatives of states may be evidence of state practice).

A similar debate centers on whether resolutions and treaties are evidence of state practice or of *opinio juris*. Anderson, *supra*, at 418–20; see also *Continental Shelf (Libya/Malta)*, Judgment, 1985 I.C.J. 13, para. 27 (June 3) (holding that multilateral conventions are instrumental in “recording and defining rules deriving from custom, or indeed in developing them”).

28. Roberts, *supra* note 2, at 758.

29. *Id.*

30. For a different take, see Ingrid Wuerth, *Reassessing Pinochet’s Legacy*, 106 AM. J. INT’L L. (forthcoming 2012) (on file with the *Duke Law Journal*), which argues that immunity implicates both traditional and modern forms of CIL.

31. See, e.g., Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* 85, 89 (Eyal Benvenisti & Moshe Hirsch eds., 2004) (observing that state practice is a “reliable proxy” for efficient behavior); Anthony D’Amato, Editorial Comment, *Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court*, 79 AM. J. INT’L L. 385, 402 (1985) (“The rules of international law . . . were not

nature of CIL distinguishes it from and serves as a powerful complement to the top-down centralized process of international treaty making and adjudication. Scholars argue, moreover, that the decentralized and dynamic nature of CIL makes it more efficient than law rooted in treaties.³² Whereas treaties result from the punctuated moments of bargaining between states and will “lock in” legal rules,³³ CIL can, in theory, better accommodate changing state preferences because it is always moving toward an optimal equilibrium.³⁴ This dynamic nature is partly characterized by what is referred to as the “chronological paradox.”³⁵ Although traditional CIL consists of uniform state practice, in order to evolve it also needs the antithesis of uniform practice—a state willing to depart from the existing rule. The *opinio juris* requirement—that states believe they are acting out of a legal obligation—makes this requirement paradoxical; states must deviate from legal rules but at the same time view themselves as acting within the law. Aside from the fiction this requirement imposes, the paradox means that a break with existing rules may be at once both illegal and potentially legal. As Professor David Bederman notes, “every act contrary to an existing custom ‘contains the seeds of a new legality,’ and . . . ‘each deviation contains the seeds of a new a

imposed on states from on high, but rather grew out of their interactions over centuries of practice and became established as customary international law. Thus the rules, almost by definition, are the most efficient possible rules for avoiding international friction and for accommodating the collective self-interest of all states.” (citation omitted). *But see* Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859, 868–69 (2006) (arguing that CIL should not be treated as one undifferentiated whole because, within different substantive contexts and different groups of states, it may or may not be efficient).

32. See *supra* note 31.

33. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1116 (1999) (noting that treaties are express promises in written form, whereas CIL is formed through the spontaneous, decentralized practices of states).

34. See David J. Bederman, *Acquiescence, Objection and the Death of Customary International Law*, 21 DUKE J. COMP. & INT’L L. 31, 43 (2010) (stating that, in comparison to top-down institutions like the International Law Commission (ILC) and treaty drafting, “it certainly makes sense that there should also be an alternative set of processes for CIL formation” and that “[t]he dynamic of State practice and CIL offers the best hope for such an alternative to the glacial pace of treaty-making”). Some scholars argue that these efficiency features do not translate in practice and that other features ensure CIL’s inefficiency. See Bradley & Gulati, *supra* note 3, at 244 (pointing to stickiness and lack of homogeneity among states as reasons for the inefficiency of international law).

35. See generally David Lefkowitz, *(Dis)solving the Chronological Paradox in Customary International Law: A Hartian Approach*, 21 CAN. J.L. & JURIS. 129 (2008) (explaining the chronological paradox and arguing that it arises from the conflation of the two steps involved in CIL’s formation). The chronological paradox is a feature of traditional, not modern, CIL. See *supra* note 4.

rule.”³⁶ Others point out that “[n]ations forge new law by breaking existing law, thereby leading the way for other nations to follow.”³⁷

This chronological paradox is one of the reasons why some scholars critique CIL as incoherent or difficult to ascertain.³⁸ Scholars also criticize CIL for being ambiguous and more a “matter of taste” than of clear legal rules.³⁹ There is rarely consensus on whether a given state practice is sufficiently uniform and widespread to constitute a customary rule and whether the *opinio juris* element has been adequately met. Thus, the amorphous nature of international custom is problematic from a rule-of-law perspective.⁴⁰

Yet, and this point is frequently overlooked, CIL cannot evolve without this ambiguity and inconsistency in state practice. Some legal uncertainty is inevitable given the need for some states to depart from the status quo and given the decentralized and gradual manner by which other states respond. Indeed, ambiguity and inconsistency are strengths of CIL. For instance, they likely embolden states under CIL to engage in more legal experimentation than states would otherwise do if they were bound by an international treaty.⁴¹ There are two reasons for this increased willingness to experiment. First, some states break with CIL because they anticipate that others will follow, or at least not oppose the deviation.⁴² Second, even if states ultimately decide that a deviation is illegal, the ambiguity of the customary rule until such a determination emerges may mute the consequences associated with a break. States may be more willing to follow the

36. Bederman, *supra* note 34, at 37 (quoting G.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 99 & n.379 (1983)).

37. Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 *BRIT. Y.B. INT'L L.* 1, 21 (1985).

38. See Kelly, *supra* note 5, at 499 (noting that certain aspects of CIL make it “incoherent” and “controversial”). For arguments that CIL has always been problematic and of questionable legitimacy, see W. Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 *CAL. W. INT'L L.J.* 133, 135 (1987); and Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 *VAND. J. TRANSNAT'L L.* 1, 11 (1988).

39. Kelly, *supra* note 5, at 451.

40. Bradley & Gulati, *supra* note 3, at 212.

41. In certain cases ambiguity is irrelevant, of course, and states will violate international law regardless of the form it takes.

42. Canada's decision in 1970 to unilaterally extend its jurisdiction over waters within one hundred miles of Canada's Arctic coast is a possible example. Professor Michael Byers notes, for instance, that Canada framed its claim “in such a way as to extend fairly easily into a right which all coastal States could claim for themselves, and which most coastal States were probably interested in claiming.” BYERS, *supra* note 25, at 95. Within a decade, Canada's unilateral assertion was viewed as having triggered a shift in CIL. *Id.* at 94.

custom breaker if it is not clear that doing so will, in the end, constitute a violation.

B. The Functions of International Adjudication

International courts have numerous functions. Most traditionally, they settle disputes between states.⁴³ The ICJ Statute, for instance, declares that the ICJ's "function is to decide . . . such disputes as are submitted to it."⁴⁴ Although dispute settlement is important, it would be myopic to consider dispute settlement to be the only judicial function. Professor Armin von Bogdandy and Ingo Venzke identify three other important functions that international courts serve: stabilizing normative expectations, making law, and controlling and legitimating public authority.⁴⁵ This Essay focuses on the first of these three contributions because it is the "stabilizing" role of international adjudication that is in direct tension with the uncertainty that CIL requires for its evolution.

Courts stabilize normative and legal expectations when they clarify the status of legal rules. Adopting a rationalist game-theoretic approach, some legal scholars discuss this clarifying role in terms of a court's "coordinating function."⁴⁶ Professors Tom Ginsburg and Richard McAdams, for instance, propose an "expressive theory" of international adjudication in which international courts create new focal points by identifying which of two conflicting legal interpretations of a rule is correct.⁴⁷ This third-party intervention allows the two parties to the dispute to then coordinate around and comply with the decisive interpretation. A key premise here is that, for certain disputes, both parties prefer coordination with respect to either of the two interpretations over no coordination but disagree over which interpretation is best. Once a court clarifies the applicable legal rule, compliance becomes self-enforcing.

43. Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority* 6–7 (Amsterdam Ctr. for Int'l Law, Working Paper No. 2012-10, 2012). For other discussions of the functions of international courts, see, for example, Dinah Shelton, *Form, Function, and the Powers of International Courts*, 9 CHI. J. INT'L L. 537, 538–40 (2009); and Karen J. Alter, *The New International Courts: A Bird's Eye View* 38–39 (Buffet Ctr. for Int'l & Comparative Studies, Working Paper No. 09-001, 2009).

44. Statute of the International Court of Justice, *supra* note 6, art 38(1), 59 Stat. at 1060, 3 Bevans at 1187.

45. von Bogdandy & Venzke, *supra* note 43, at 6–12.

46. Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1243 (2004).

47. *Id.* at 1270–71.

Although the expressive theory is intended to apply only to states that are parties to the dispute, international judicial decisions that clarify existing rules also influence states that are not formally bound by the decision⁴⁸—for both rationalist and legitimacy reasons.⁴⁹ First, international judicial decisions shape contemporary understandings of international legal rules⁵⁰ and signal information about the likelihood and content of future judicial decisions.⁵¹ Even U.S. courts, which have been among the most explicitly defiant of ICJ rulings,⁵² turn occasionally to ICJ decisions for guidance in interpreting international law.⁵³

48. For a review of the literature on the impact of international court decisions on those not party to the dispute, see generally Laurence R. Helfer, *The Effectiveness of International Adjudicators*, in THE OXFORD HANDBOOK ON INTERNATIONAL ADJUDICATION (Karen J. Alter, Cesare Romano & Yuval Shany eds., forthcoming 2013) (on file with the *Duke Law Journal*).

49. See Laurence R. Helfer & Erik Voeten, International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe 7–9 (July 9, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1850526 (arguing that international judicial decisions can influence states—and constituencies within them—through three pathways: “the threat of future litigation, the persuasive authority of judicial reasoning, and the agenda-setting effect” and finding that judgments supporting LGBT policy issues by the European Court of Human Rights (ECHR) increase the probability of national policy reform even for countries not subject to membership conditionality).

50. See Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL’Y 127, 132 (2010) (explaining how “the jurisprudential *acquis* of the ICJ on such essential questions as state responsibility, countermeasures and treaty interpretation has been repeatedly invoked” in various contexts); Jordan J. Paust, *Domestic Influence of the International Court of Justice*, 26 DENV. J. INT’L L. & POL’Y 787, 787–88 (1998) (“[D]ecisions and advisory opinions of the International Court of Justice have generally been widely received as authoritative explications of international law. . . . [They] have acquired a functional significance far beyond what printed constitutive articles might have allowed.”).

51. As Professors Andrew Guzman and Timothy Meyer state, “[t]here is no doubt that international tribunals’ decisions signal the direction of future rulings and, de facto, define the contours of the legal obligations states face.” Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT’L L. 515, 516 (2009); see also Alvarez-Jiménez, *supra* note 7, at 705 (“The declaration of a rule as customary or the denial of such status may have important consequences on States’ practice in the sense that the declaration may promote the practice of the given rule . . . , while the denial may give States a powerful reason not to follow the specific practice in question, thereby affecting its possible emergence as custom in the future.”).

52. See, e.g., *Medellín v. Texas*, 552 U.S. 491, 504–05 (2008) (“[W]hile treaties may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be self-executing and is ratified on these terms.” (quoting *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)) (internal quotation marks omitted)); *Breard v. Greene*, 523 U.S. 371, 375 (1998) (“[W]hile we should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has

Second, international judicial decisions can legitimize or delegitimize a particular legal rule or legal norm, shaping—both directly and indirectly—the views of state officials, judges, and other actors about whether to follow it.⁵⁴ Many international legal scholars have long recognized that even in the absence of traditional sanctioning mechanisms, international law, when it is viewed as legitimate, exerts a “compliance pull.”⁵⁵ Although most scholarship in this vein focuses on state incentives,⁵⁶ the same logic applies to substate actors such as domestic courts. Under this view, domestic courts comply with international law, including international judicial decisions, because they consider the legal rules to be legitimate.⁵⁷ Domestic courts may also comply with international law because they view themselves as participants in a global practice of judging.⁵⁸

These functions of international judicial decisions—providing information about current legal interpretations, signaling the likely

been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.”).

53. In his study of U.S. judicial treatment of ICJ decisions between 1946 and 1998, Professor Jordan Paust counts forty-two cases in which federal courts applied ICJ decisions or advisory opinions to determine the content of international law. Paust, *supra* note 50, at 791–92. In *Gutierrez v. State*, No. 53506, 2012 Nev. Unpub. LEXIS 1317, at *1–2 (Nev. Sept. 19, 2012), for example, the U.S. district court cited the ICJ’s decision in *Avena & Other Mexican Nationals (Mexico v. United States)*, Judgment, 2004 I.C.J. 12 (Mar. 31), despite the Supreme Court’s ruling in *Medellín v. Texas*, 552 U.S. 491 (2008), which held that *Avena* did not preempt the procedural rules of states, *id.* at 505–06. For a discussion of other cases in the United States that have recognized or declined to recognize ICJ decisions, see David M. Reilly & Sarita Ordonez, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, 28 N.Y.U.J. INT’L L. & POL. 435, 459–64 (1997).

54. See Howse & Teitel, *supra* note 50, at 130–31 (discussing the complexity of norms and also noting the more rationalist point that “instead of *changing* behavior directly, international legal norms . . . may make it more possible or less costly for a state to adhere to an existing or recently adopted policy course”); Niels Petersen, *Lawmaking by the International Court of Justice—Factors of Success*, 12 GERMAN L.J. 1295, 1310 (2011) (noting the ICJ’s impact, through its judgment in *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, Judgment, 1970 I.C.J. 3 (Feb. 5), on the “subsequent legal discourse and the communicative practice of states” with respect to the *erga omnes* norm).

55. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705, 712 (1988). See generally *id.* (explaining that rules with certain characteristics are more likely to be obeyed, and that the compliance rate is one indicator of a rule’s legitimacy).

56. See, e.g., *id.* at 705–06 (examining the “surprising” phenomenon of why “nations ever obey [international law’s] strictures or carry out its mandates”).

57. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 25 (1990).

58. See Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103, 1104 (2000) (stating that domestic judges recognize and interact with supranational courts because of “a deep sense of participation in a common global enterprise of judging, an awareness that provides a foundation for a global community of law”).

nature of future decisions, and legitimizing current legal norms—may be particularly powerful in cases in which domestic courts are the custom breakers. Domestic courts face the task of identifying the content of and enforcing legal rules, and courts' identities are shaped by their obligation to apply legal rules, not violate them. At least in the absence of a conflict with domestic law or pressure from the other branches of government, domestic courts may be more inclined than their executive or legislative counterparts to follow nonbinding international judicial decisions.

C. The Constraining Effect of International Adjudication on the Evolution of Customary International Law

In the context of custom breaking by domestic courts, the role of international courts in clarifying legal rules risks impeding the traditional evolutionary process of CIL in which one state acts and others respond. Whether international adjudication ultimately has this constraining effect will depend on a number of factors, such as whether the international court views itself as a “law creator[] . . . [or] enforcer[],”⁵⁹ and whether the adjudication occurs soon after the deviation. If a court views itself as generally upholding rather than changing the status quo, as characterizes the ICJ,⁶⁰ it is likely to invalidate any departure from CIL. If a legal claim challenging custom breaking is filed shortly after such a break occurs, a court's invalidation will preempt state response. Alternatively, if the claim is filed after other states have begun to respond to the break, a court can evaluate the state-response stage rather than preempt or deter it.

But this point raises the question of how much of an opportunity states should have before a break with CIL becomes amenable to international judicial review. There is no hard-and-fast rule and, in some cases, a clear line may be difficult to draw. Ultimately, however, the issue of whether a case is ripe for judicial review is itself worthy of an international court's attention before it proceeds to evaluate a case on its merits.

59. Roberts, *supra* note 10, at 64. For an elaboration of this distinction as applied to domestic courts, see *id.* at 64–73.

60. The ICJ has consistently been a follower of existing interpretations, not a trendsetter, at least since *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Judgment, 1986 I.C.J. 14 (June 27). Even in cases in which the ICJ has used a modern deductive approach to identifying CIL, its determinations simply confirmed already widely accepted views about the content of CIL. Alvarez-Jiménez, *supra* note 7, at 690, 693.

At least one other scholar has recognized the potential for international adjudication to interfere with the evolution of CIL. Professor Roger O’Keefe argues that international courts can trigger a “customary international legal feedback loop.”⁶¹ In this loop an international court, which sees itself as following state practice, upholds traditional CIL on the basis that domestic judicial decisions continue to adhere to it.⁶² Domestic courts in turn view the international court’s ruling as evidence that traditional CIL persists, and then continue to follow such customs.⁶³

O’Keefe’s model accurately captures the dynamic that occurs when international and domestic courts simply follow one another’s lead, but it leaves unclear why this dynamic is problematic. I argue that an early international adjudication of a break with custom that occurs before states have had the opportunity to respond is problematic in two respects: substantively, it may discourage others from following the custom breaker and prevent better CIL from emerging; and procedurally, regardless of whether states decide to follow the custom breaker, it cuts short the opportunity for states to debate and respond to deviations from the status quo. This Essay focuses primarily on the procedural effect.

First, on a substantive level, international adjudication of custom-breaking cases may prevent better CIL from emerging. Legal scholars who study U.S. jurisprudence, and indeed U.S. Supreme Court Justices themselves, have recognized the value of allowing issues to percolate before subjecting them to Supreme Court review. Justice Stevens, for instance, has noted:

The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of those lower courts. Irrespective of docket capacity, the Court should not be compelled to intervene to

61. Roger O’Keefe, *State Immunity and Human Rights: Heads and Walls, Hearts and Minds*, 44 VAND. J. TRANSNAT’L L. 999, 1017 (2011).

62. *See id.* at 1019 (explaining that international case law is influenced by both international and domestic law).

63. *Id.*

eradicate disuniformity when further percolation or experimentation is desirable.⁶⁴

This insight applies also to custom breaking. International adjudication in the context of custom breaking not only has the effect of insisting on uniformity but, especially for international courts with nondiscretionary jurisdiction, leaves little room for the type of “exploratory consideration”⁶⁵ that can help improve the quality of legal rules and judicial decisions.⁶⁶

More fundamentally, and regardless of whether international adjudication prevents CIL from improving, early adjudication blocks the process by which traditional CIL evolves. For this reason international judicial review in this context may lack legitimacy, at least from the perspective of CIL. Given the broader impact of ICJ decisions, for example, an early ICJ invalidation of a break with custom makes it more costly for other states to follow the custom breaker and less necessary for those that would oppose the break to do so explicitly. As a result, states maintain or revert to the status quo, and debate around the question is forestalled. The fundamental

64. Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 438 (2004) (quoting *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting)); see also *id.* at 403 n.71 (“We have in many instances recognized that when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.” (quoting *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting)) (internal quotation marks omitted)).

65. Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 716 (1984).

66. The proliferation of international courts offers no panacea, although it may marginally mitigate the constraining effect of international adjudication in the context of custom breaking. It is true that the greater the diversity and number of international courts, the less impact a single court can exert on the future evolution of a customary rule. Yet, international courts generally try to ensure consistency with one another. See Karin Oellers-Frahm, *Multiplication of International Courts and Tribunals and Conflicting Jurisdiction—Problems and Possible Solutions*, 5 MAX PLANCK Y.B. UNITED NATIONS L. 67, 76–77 (2001) (“In particular the jurisprudence of the ICJ is often referred to by other judicial bodies as stating the generally applicable law”). This is partly for the reason mentioned earlier: international courts usually follow, rather than lead, existing interpretations of CIL. See *supra* note 60. And this is true not only between international and domestic courts but also among international courts. As former ICJ President Bruno Simma stated,

I would go as far as claiming that if there are international institutions that are constantly and painstakingly aware of the necessity to preserve the coherence of international law, it is the international courts and tribunals. Such caution might sometimes come at the price of dodging issues that would very much have deserved to be tackled

Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT’L L. 845, 846 (2004).

problem in these cases is that international adjudication inhibits the evolutionary process of CIL from beginning. Yet this process of decentralized reactions by states is at the heart of what distinguishes CIL from other sources of international law.

Although his focus is on “law in flux” and not custom breaking, Professor Vaughan Lowe advances a similar argument: “What premature litigation . . . does, is short-circuit [public debate over a potential new legal standard]. It delivers a verdict which purports to settle the question definitively, but does so without the benefit of informed analysis and comment on the matter.”⁶⁷ By centralizing an important decision in the hands of a few judges rather than keeping it decentralized across all states, international adjudication in custom-breaking cases stifles a debate that may lead to a better rule and supplants a process that is open, at least theoretically, to the participation of all states. International law evolves through both top-down and bottom-up processes. Immediate adjudication of custom-breaking cases, however, risks replacing rather than complementing CIL.⁶⁸

67. Vaughan Lowe, *The Function of Litigation in International Society*, 61 INT’L & COMP. L.Q. 209, 216 (2012); cf. Lori Fisler Damrosch, *Changing the International Law of Sovereign Immunity Through National Decisions*, 44 VAND. J. TRANSNAT’L L. 1185, 1197 (2011) (“In order for the customary international law of sovereign immunity to continue to evolve in response to actions and reactions of diverse decision makers in a variety of countries (judicial, legislative, and executive), an active dialogue among institutions should be encouraged. Inter-judicial dialogue—the process by which courts take note of previous rulings elsewhere and determine whether or not to follow them—can illuminate the issues and articulate reasons either for maintaining traditional conceptions of state immunity or for adjusting preconceptions in light of evolving views on the optimal role for national courts in providing remedies for wrongs committed by foreign states.”).

68. One important objection to this Essay’s critique of international adjudication of custom breaking focuses on the logical inference that any case that the ICJ or other international courts adjudicate that involves CIL arguably involves custom breaking. Taken literally, the statement that “[e]ach deviation contains the seeds of a new rule,” D’AMATO, *supra* note 8, at 98, implies that even the most egregious conduct—for example uncontested crimes of aggression—should, by this Essay’s logic, be shielded from international adjudication until states respond. Admittedly the critique advanced in this Essay requires acknowledging outright that not all custom-breaking cases are the same. Only some cases of custom breaking can reasonably be expected to have the potential to become a new legal rule—perhaps those in which there is political or public debate about the direction that CIL should take. The argument advanced in this Essay addresses these types of cases.

II. CUSTOM BREAKING BY DOMESTIC COURTS: THE FOREIGN SOVEREIGN IMMUNITY RULE

To illustrate the potential of international adjudication to inhibit the evolution of CIL, this Part draws on two ICJ rulings that invalidated domestic judicial breaks from the customary rules of head-of-state immunity and state immunity. The discussion suggests that the ICJ's adjudication in these cases preempted state response that follow or should follow a break with CIL. Even in cases in which there is some state practice⁶⁹ following a deviation, the ICJ has exhibited little awareness that this practice, as part of the state-response stage, is important for determining the legality of the original break from CIL. Additionally, this Part discusses a third example of custom breaking, the *Pinochet* case, which involved the immunity of a former head of state and proceeded without review by an international court. I argue that the absence of preemptive adjudication in this case has kept the door more open to future legal change than in the other two cases. More importantly, the absence of preemptive adjudication has ensured that the decentralized dynamic of CIL has shaped, and continues to shape, the current legal rule. The central claim in this Part is that, regardless of whether states ultimately choose to follow a break with CIL, states are able to make the decisions for themselves if international courts have not first adjudicated the issue. By contrast, when international courts engage in early review of a custom-breaking case, they risk halting the traditional process by which CIL evolves.

A. *Congo v. Belgium*

In *Congo v. Belgium*,⁷⁰ international adjudication led to the invalidation of a court-led break with the custom of granting immunity to high-level incumbent officials.⁷¹ Other states had little opportunity to determine on their own whether they should adhere to the existing rule or follow the custom breaker. On April 11, 2000, a Brussels court issued an international arrest warrant for the then-

69. This Part focuses on domestic judicial decisions, but the critique applies to other forms of state practice as well, including executive statements and national legislation. For a discussion of the problem of conflicting state practice by different domestic actors, see generally Wuerth, *supra* note 10.

70. *Congo v. Belgium*, Judgment, 2002 I.C.J. 3 (Feb. 14).

71. *Cf. id.* para. 58 (finding no exception to the rule that current ministers for foreign affairs are immune from criminal jurisdiction).

incumbent minister of foreign affairs of the Democratic Republic of Congo (DRC).⁷² Based on universal jurisdiction, the arrest warrant alleged crimes against humanity and war crimes in connection with the 1998 Kinshasa massacre.⁷³ This case marked a salient break from CIL because it was the first time a court had issued an international arrest warrant against an incumbent high-level official.⁷⁴ In its petition to the ICJ, the DRC claimed that Belgium, in permitting its court to issue the arrest warrant, violated the immunity of DRC officials and that the Belgian court's assertion of universal jurisdiction violated the DRC's sovereignty.⁷⁵

In February 2002, the ICJ ruled in a 13-to-3 decision that Belgium had violated the custom of granting incumbent high-level officials immunity from the criminal jurisdiction of foreign courts.⁷⁶ In a decision that has been deemed "remarkable for its brevity,"⁷⁷ the ICJ noted that, after a careful review of state practice, it found no exception to the customary rule of sovereign immunity for human rights violations.⁷⁸ The ICJ decision received mixed reactions.⁷⁹ Some criticized the decision for stating in dicta that immunity applies even to former heads of state and high-level officials.⁸⁰ Others disparaged the court for reaching its decision "without reference to any supporting state practice."⁸¹

72. *Id.* para. 1.

73. *Id.* para. 67.

74. For example, there was no arrest warrant issued for Muammar Gaddafi when he was tried in France in 2000 for a 1989 plane explosion. *Gaddafi*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Mar. 13, 2001, D. Jur., No. 2631, translated in 125 I.L.R. 490 (2004).

75. Application Instituting Proceedings, *Congo v. Belgium*, at 3 (Oct. 17, 2000), <http://www.icj-cij.org/docket/files/121/7081.pdf>.

76. *Congo v. Belgium*, Judgment, 2002 I.C.J. 3, para. 78.

77. Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 853, 854 (2002).

78. *Congo v. Belgium*, Judgment, 2002 I.C.J. 3, para. 58.

79. Compare Cassese, *supra* note 77, at 855 ("By and large this conclusion is convincing The Court must be commended for elucidating and spelling out an obscure issue of existing law."), with Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 877, 878 (2002) ("[T]he ICJ erred in its decision that there exists immunity for former Ministers of Foreign Affairs which attaches to the official nature of an act, if a core crime has been committed").

80. E.g., Adam Day, Note, *Crimes Against Humanity as a Nexus of Individual and State Responsibility: Why the ICJ Got Belgium v. Congo Wrong*, 22 BERKELEY J. INT'L L. 489, 490–91 (2004).

81. Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EUR. J. INT'L L. 815, 820 (2011).

Although the ICJ's review of the state-practice prong of CIL was brief,⁸² what makes the judgment problematic from a procedural perspective was the lack of inquiry into how states responded or were responding to Belgium's break with CIL. The ICJ summarized the conflicting Belgian and DRC interpretations of the British House of Lords' 1999 decision rejecting immunity in the *Pinochet* case and the French Court of Cassation's 2001 decision upholding the immunity of then-head of state Muammar Qaddafi.⁸³ But the ICJ did not provide its own evaluation of the specific cases.⁸⁴ Even more relevantly, it neither distinguished the Qaddafi case as part of the state-response stage, nor evaluated whether the French Court of Cassation was explicitly rejecting, or was even aware of, the Belgian deviation.⁸⁵ The ICJ, furthermore, made no reference to what seems to have been the only other immunity case involving an incumbent head of state during the period between Belgium's issuing the arrest warrant in April 2000 and the ICJ's handing down its decision in February 2002. In *Tachiona v. Mugabe*,⁸⁶ a federal district court in New York held,⁸⁷ with no reference to Belgium's arrest warrant, that Zimbabwe's president and foreign minister were protected by head-of-state and diplomatic immunity from claims arising under the Alien Tort Statute⁸⁸ and the Torture Victim Protection Act of 1991.⁸⁹ The point is not that states had begun to react positively to Belgium's deviation; both *Qaddafi* and *Tachiona* suggest the opposite. Rather, the argument is that the ICJ preempted rather than evaluated state responses to Belgium's break with CIL. If the ICJ had engaged in an analysis of the two cases, or indeed of any other type of state response that would have qualified as state practice, then the ICJ would have been more aligned with the process by which CIL traditionally evolves: based on state reactions to the deviation, not the deviation itself. Instead, the ICJ did not inquire into state responses at all.

82. The majority opinion cited two cases and five treaties. *Congo v. Belgium*, Judgment, 2002 I.C.J. 3, para. 58.

83. *Id.* paras. 56–57 (discussing *Pinochet*, [2000] 1 A.C. 147 (H.L.), and *Gaddafi*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Mar. 13, 2001, D. Jur., No. 2631, translated in 125 I.L.R. 490 (2004)).

84. *See id.* paras. 56–58.

85. *See id.*

86. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001), *rev'd in part sub. nom.* *Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

87. *Id.* at 315–16.

88. Alien Tort Statute, 28 U.S.C. § 1350 (2006).

89. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2006).

The more fundamental point—which the ICJ, lacking discretionary jurisdiction, cannot control—is that states did not have much opportunity to respond to Belgium’s issuing the arrest warrant. As noted earlier, it would be difficult to formulate a bright-line rule determining how much opportunity states should have before a break with CIL is subjected to international judicial review. But the fact that only two states appeared to have faced a similar case by the time the court issued its decision in *Congo v. Belgium* suggests that the ICJ adjudication occurred problematically early.

The ICJ decision is also troubling from a more substantive perspective: even though other courts are not formally bound by the ICJ judgment, the decision may well deter them from following Belgium’s now-invalidated deviation from the custom regulating head-of-state immunity. From a rationalist perspective, domestic courts may be reluctant to reject state claims to immunity for incumbent high-level officials because the courts will calculate that an international court would reverse its decision as well. Domestic courts may also be reluctant for more normative reasons; the ICJ ruling against Belgium reaffirms the norm of sovereign equality, even in an era of individual accountability for human-rights crimes. If either or both of these rationales are correct, then the ICJ ruling makes domestic judicial restrictions of immunity less likely now than before Belgium departed from the status quo. Put differently, the ICJ decision may have not only invalidated a break from CIL, but further entrenched the existing rule.

B. *Germany v. Italy*

In the second custom-breaking example, *Germany v. Italy*,⁹⁰ the ICJ again invalidated a court-led break with CIL—this time regulating the immunity rule for states. Compared to the *Congo v. Belgium* case, domestic courts had more time to respond to the break before the ICJ handed down its ruling—almost eight years instead of two.⁹¹ But by the time the ICJ issued its decision, there were still only

90. *Germany v. Italy*, Judgment, para. 101 (Feb. 3, 2012), <http://www.icj-cij.org/docket/files/143/16883.pdf>.

91. In *Congo v. Belgium*, the Belgian judge issued the arrest warrant in April 2000. *Congo v. Belgium*, Judgment, 2002 I.C.J. 3, para. 1 (Feb. 14). The ICJ issued its judgment approximately two years later, in February 2002. *See id.* at 3. In comparison, the Italian Supreme court issued its decision rejecting Germany’s claim to immunity in *Ferrini v. Federal Republic of Germany*, Cass., sez. un., 11 marzo 2004, n. 5044, Foro it. 2007, I, 936 (It.), translated in 128

a handful of judicial rulings outside of Italy that were part of the state-response stage. While relying extensively on domestic judicial decisions to determine state practice,⁹² the ICJ conducted only a limited inquiry into the judicial rulings that followed the initial deviation and showed little awareness that, as part of the state-response stage, these rulings warranted particular attention. Although this Section focuses on the ICJ's analysis of domestic judicial decisions, the same critique applies to its treatment of other forms of state practice, such as national legislation.⁹³ The ICJ did not distinguish legislation and other forms of state practice that preceded Italy's break with CIL—the 2004 *Ferrini*⁹⁴ decision—from that which followed the break.⁹⁵ Both the dearth of state response to the initial deviation and the ICJ's lack of inquiry into the limited state practice that did follow it are problematic from a procedural perspective.

In the 2004 *Ferrini* decision, the Italian Supreme Court rejected Germany's claim for immunity from allegations that Germany deported and subjected an Italian national to forced labor during World War II.⁹⁶ The court justified its decision on ground that the rules regulating *jus cogens* norms prevail over rules regulating state immunity.⁹⁷ With the exception of a Greek high-court ruling against Germany, which was superseded before the Italian Supreme Court ruling,⁹⁸ the Italian 2004 rejection was a sharp break from the

I.L.R. 659 (2006), in March 2004. The ICJ handed down its decision invalidating the Italian ruling in February 2012. See *Germany v. Italy*, Judgment.

92. See *Germany v. Italy*, Judgment, paras. 72–76.

93. In *Germany v. Italy*, the ICJ identified state practices of “particular significance” to include domestic judicial decisions involving immunity claims, national legislation regulating immunity, government claims to immunity, and statements made by states in the context of the ILC and UN's work on the immunity question. *Id.* para. 55.

94. *Ferrini v. Federal Republic of Germany*, Cass., sez. un., 11 marzo 2004, n. 5044, Foro it. 2007, I, 936 (It.), translated in 128 I.L.R. 659 (2006).

95. For example, in its analysis of national legislation, the ICJ did not distinguish legislation adopted before the Italian break with CIL from national legislation enacted after the break. See *id.* para. 70. In its discussion of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, moreover, the ICJ noted that the delegates clearly chose to exclude military activities from the scope of the treaty, but did not discuss whether the delegates made this decision in reaction to or with any awareness of the *Ferrini* case. See *Germany v. Italy*, Judgment, para. 69.

96. *Ferrini*, Foro it. 2007, I, at 945, 128 I.L.R. at 661.

97. *Id.* at 942, 128 I.L.R. at 668–69. The Italian Supreme Court also justified its decision based on the argument that Germany's violations occurred on Italian territory. See *id.* at 945, 128 I.L.R. at 670–72.

98. See *Germany v. Italy*, Judgment, para. 76 (noting that *Margellos v. Federal Republic of Germany*, Anotato Eidiko Dikastirio [A.E.D.] [Special Supreme Court] 6/2002 (Greece),

traditional state immunity rule and led to a stream of cases against Germany.⁹⁹ Germany filed an application to the ICJ against Italy in 2008, alleging that Italy had violated its immunity under CIL.¹⁰⁰

The ICJ issued a decision in February 2012 upholding Germany's jurisdictional immunity from Italian courts.¹⁰¹ In reaching this decision, the ICJ considered two core arguments advanced by Italy, one that the ICJ labeled as the "territorial tort principle" and the second that involved a combination of claims regarding Germany's violations of fundamental rules and the lack of reparations for these violations.¹⁰² This Essay focuses on the ICJ's treatment of the latter argument, and particularly on its treatment of Italy's claim that violations of *jus cogens* norms, when combined with the lack of reparations, eliminate a state's right to claim immunity from foreign courts.¹⁰³ The ICJ considered both a disaggregated version of Italy's argument (violation of *jus cogens* norms and right to reparations),¹⁰⁴ as well as the additive version¹⁰⁵ that Italy actually advanced in its Counter-Memorial.¹⁰⁶ The ICJ concluded that the rules regulating

translated in 129 I.L.R. 526 (2007), "repudiated the reasoning of [an earlier Greek high-court ruling] and held that Germany was entitled to immunity").

99. See Memorial of the Federal Republic of Germany, *Germany v. Italy*, paras. 23–45 (June 12, 2009), <http://www.icj-cij.org/docket/files/143/16644.pdf> (describing the cases).

100. Application Instituting Proceedings, *Germany v. Italy*, at 1 (Dec. 23, 2008), <http://www.icj-cij.org/docket/files/143/14923.pdf>.

101. *Germany v. Italy*, Judgment, para. 139(1).

102. *Id.* paras. 61–108.

103. See Counter-Memorial of Italy, *Germany v. Italy*, paras. 4.5, 4.66–4.77 (Dec. 22, 2009), <http://www.icj-cij.org/docket/files/143/16648.pdf> ("[A] State responsible for violations of fundamental rules is not entitled to immunity in cases in which, if granted, immunity would be tantamount to exonerating the State from bearing the legal consequences of its violation of principles of paramount importance."). This argument is distinct from the argument adopted by Italian Supreme Court in *Ferrini*, which focused only on *jus cogens* norms. See *Ferrini v. Federal Republic of Germany*, Cass., sez. un., 11 marzo 2004, n. 5044, *Foro it.* 2007, I, 936 (It.), *translated in* 128 I.L.R. 659 (2006).

Although not discussed in this Essay, Germany also alleged two other claims: (1) that Italy had violated Germany's jurisdictional immunity by declaring a Greek judgment against Germany to be enforceable in Italy (the Greek judgment was superseded but not overturned by the subsequent Greek decision in the *Margellos* case, see *Germany v. Italy*, Judgment, para. 76; Memorial of the Federal Republic of Germany, *supra* note 99, para. 65); and that (2) Italy violated Germany's immunity from enforcement by attaching German-owned property in Italy to ensure the enforcement of the Greek decision against Germany, see Memorial of the Federal Republic of Germany, *supra* note 99, paras. 33–41, 103–107. The ICJ also upheld these two claims. *Germany v. Italy*, Judgment, paras. 139.2–139.3.

104. See *Germany v. Italy*, Judgment, paras. 92–103.

105. See *id.* paras. 105–06.

106. See *supra* note 103 and accompanying text.

violations of *jus cogens* norms and the right to reparations and those regulating immunity “address different matters.”¹⁰⁷ It continued, “[t]he rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State.”¹⁰⁸

Relative to the *Congo v. Belgium* case, states had more time, and perhaps more opportunity, to react to Italy’s deviation. The ICJ, however, devoted minimal attention to other state responses to the Italian Supreme Court’s argument that *jus cogens* norms prevail over claims to immunity. The ICJ cited to six decisions by domestic courts outside of Italy that have also addressed the *jus cogens* norms argument, each of which upheld the immunity claim.¹⁰⁹ The ICJ showed little recognition that, for evaluating the legality of the Italian break with CIL, the four decisions that followed the *Ferrini* decision should carry more weight than the two that preceded it. The ICJ also did not evaluate whether those four decisions specifically repudiated Italy’s break with CIL in *Ferrini*.¹¹⁰ That is, the ICJ showed little awareness that both the number and the content of the post-*Ferrini* decisions are important for evaluating Italy’s break with the state immunity rule.

107. *Germany v. Italy*, Judgment, para. 93.

108. *Id.*

109. *Id.* para. 96. Canada’s decision is *Bouzari v. Iran (Islamic Republic)* (2004), 243 D.L.R. 4th 406 (Can. Ont. C.A.). Greece’s decision is *Margellos*. New Zealand’s decision is *Fang v. Jiang* [2007] 141 NZAR 420 (HC), reprinted in 141 I.L.R 702 (2011). Poland’s decision is *Natoniewski v. Federal Republic of Germany*, [Supreme Court] Oct. 29, 2010, see *Polish Practice in International Law*, 30 POLISH Y.B. INT’L L. 299 (2010). Slovenia’s decision is *Ustavno Sodisce* [Constitutional Court of Slovenia] Mar. 8, 2001, Case No. Up-13/99, available at [http://odlocitve.us-rs.si/ursr/us-odl.nsf/bcaf0777a0b458cac12579c30036ecff/c0440295eef5e741c12571720028f197/\\$FILE/Up-13-99_an.pdf](http://odlocitve.us-rs.si/ursr/us-odl.nsf/bcaf0777a0b458cac12579c30036ecff/c0440295eef5e741c12571720028f197/$FILE/Up-13-99_an.pdf). The United Kingdom’s decision is *Jones v. Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270 (H.C.). The Greek and Slovenian decisions were handed down before *Ferrini*, in September 2002 and March 2001, respectively.

The *Bouzari* decision was handed down in June 2004, only a few months after *Ferrini*. But the proximity in time does not explain the ICJ’s silence in analyzing this case given that the ICJ also did not discuss the December 2006 *Fang* decision. The court did briefly discuss the June 2006 *Jones* decision, but only to distinguish state immunity from head-of-state immunity, not to evaluate it as evidence of state reactions to the *Ferrini* case. See *Germany v. Italy*, Judgment, para. 87.

110. The ICJ similarly failed to evaluate the response of non-Italian courts to the *Ferrini* argument about the relevance of territoriality of the crimes with one exception, the Polish *Natoniewski* decision. See *Germany v. Italy*, Judgment, para. 74. The ICJ also did not note which domestic judicial decisions concerning the gravity-of-violations argument preceded the *Ferrini* ruling and which followed it. *Id.* paras. 83–85.

Particularly because domestic courts are the central actors evaluating claims to immunity, the ICJ's invalidation of the Italian deviation may have the substantive effect of entrenching the existing sovereign immunity rule.¹¹¹ As with the *Congo v. Belgium* case, for both rationalist and normative reasons, other domestic courts may be influenced by the ICJ's decision even though they are not formally bound by it. Indeed, in light of the ICJ's affirmation of the traditional sovereign immunity rule, domestic courts may feel even more compelled than before to adhere to the state immunity rule.

A potential objection to the argument that the ICJ may impede the evolution of CIL in this area is that it is the states themselves, not international courts, which pose the true barriers to changing the state immunity rule. Indeed, one might even suggest that executives turned to the ICJ strategically, calculating that the court would uphold Germany's immunity and therefore not only clarify but also strengthen the existing sovereign immunity rule.¹¹² This objection, however, misses the point. This Essay's critique of international adjudication in custom-breaking cases is based primarily on process, rather than outcome. Regardless of whether the ICJ's ruling is consistent with what states would have ultimately decided for themselves, it is procedurally problematic for the ICJ to preempt the traditional process by which CIL evolves.

C. *The Pinochet Case*

The *Pinochet* case¹¹³ reveals two advantages of allowing the CIL process to unfold organically rather than allowing it to be preempted

111. *But see* Paul Christoph Bornkamm, *State Immunity Against Claims Arising from War Crimes: The Judgment of the International Court of Justice in Jurisdictional Immunities of the State*, 13 GERMAN L.J. 773, 782 (2012) ("The Court's findings . . . are likely to discourage national courts from assuming an exception to immunity applicable to claims arising from serious violations However, the approach taken by the Court should not be understood as an obstacle to possible new developments of the law in that field. In fact, hope remains that the relationship between state immunity and the right of access to justice will continue to be a dynamic one. This hope rests in the fact that the main actors here are courts, not governments. It is up to courts to determine the scope of jurisdictional immunity in a particular case—and they are more likely to be driven by considerations of justice than by political concerns.").

112. For instance, when Germany submitted its petition to the ICJ against Italy, the Italian government issued a joint declaration with Germany expressing support for the petition and the opportunity for the ICJ to clarify the law. *See* Press Release, Int'l Court of Justice, *Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*: Greece Requests Permission To Intervene in the Proceedings 3 (Jan. 17, 2011), available at <http://www.icj-cij.org/docket/files/143/16294.pdf>.

113. *Pinochet*, [2000] 1 A.C. 147 (H.L.).

by an international court.¹¹⁴ First, observers can be confident that the apparent, albeit contested, persistence of the immunity rule despite the *Pinochet* case reflects the broader preferences of states, or their courts, rather than the evaluation of a handful of judges at the ICJ. That is, even if the absence of international adjudication does not affect whether CIL changes, the outcome is still more legitimate from a procedural perspective. Second, the absence of early adjudication means that the door is more open than in the other two cases to future legal change; domestic courts can follow *Pinochet* without having to overcome any of the rationalist or normative barriers that they faced in the other cases, which stem from the prospect of defying an international court ruling.

In *Pinochet*, Spanish Judge Baltasar Garzon issued an arrest warrant in October 1998 against Augusto Pinochet, the former Chilean president, for the commission of torture and other crimes.¹¹⁵ British officials arrested Pinochet in London six days later, while he was visiting the city for back surgery.¹¹⁶ Pinochet's lawyers filed suit in British courts, arguing that the arrest warrant violated Pinochet's immunity as a former head of state. Although the Divisional Court in London invalidated the arrest warrant,¹¹⁷ the House of Lords, in a 3-to-2 decision, reinstated it on appeal.¹¹⁸ In what many scholars consider to be a watershed ruling, the House of Lords held that immunity attaches only to official conduct,¹¹⁹ which does not include torture. This decision was discarded, however, due to an undisclosed connection between one of the judges and Amnesty International, which had presented arguments in the case.¹²⁰ In a rehearing with a different set of judges, the House of Lords upheld the arrest warrant

114. For extensive analyses of the implications of the *Pinochet* judgment, see generally NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* (2005); Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT'L L. 415 (2000); and Wuerth, *supra* note 30.

115. Byers, *supra* note 114, at 415–17.

116. Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2133 (1999).

117. *Ex parte Augusto Pinochet Ugarte* (Q.B. Div'l Ct. Oct. 28, 1998) (Eng.), *reprinted in* 38 I.L.M. 68, 85 (1999).

118. *R v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte (Pinochet I)*, [1998] 3 W.L.R. 1456 (H.L.) at 1457–58.

119. *Id.* at 1457.

120. *Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (Pinochet I)*, [1998] 3 W.L.R. 1456 (H.L.), was annulled by *Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 2), [1999] 2 W.L.R. 272 (H.L.).

again.¹²¹ But it did so on a narrower ground,¹²² basing its decision on domestic legislation implementing the Convention Against Torture.¹²³ Many scholars and legal advocates at the time deemed the final decision also to be a landmark for human rights.¹²⁴

Despite the anticipation that the break with CIL would “usher[] in a new era of accountability” for former high-level officials,¹²⁵ few courts have explicitly followed *Pinochet*’s lead.¹²⁶ The absence of a bandwagon effect abrogating foreign sovereign immunity in the wake of *Pinochet* is important. It suggests either that the opportunities for rejecting immunity have been limited or that they have been sufficient but courts have nonetheless adhered to the immunity rule. Both of these possibilities are consistent with the traditional evolutionary process of CIL. Had the ICJ issued a judgment invalidating the *Pinochet* decision, it would be difficult to determine whether the apparent but debatable persistence of the immunity rule for former heads of state was the result of the decentralized preferences of states or of the ICJ’s intervention.

121. *Pinochet*, [2000] 1 A.C. 147 (H.L.) at 148–49.

122. *Id.* at 164.

123. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85.

124. See William J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 HARV. INT’L L.J. 129 (2000) (“As the *Pinochet* precedent evolves, other countries will begin to participate in this emerging universal system of transnational law litigation. This move away from the state-centric paradigm will have a profound effect on human rights and international law.” (footnote omitted)).

125. See Wuerth, *supra* note 30, (manuscript at 1). Many argue that ultimately *Pinochet* did usher in a new era. See, e.g., Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 238 (“[A] growing number of international and national courts have abrogated the conduct immunity of former heads of state This trend can be traced to the *Pinochet* case, a watershed 1999 decision in which the British House of Lords held that Chile’s former head of state could be extradited to Spain to stand trial for torture.” (citation omitted)).

126. In a forthcoming article, Professor Ingrid Wuerth examines subsequent immunity cases and argues that functional immunity persists for violations of *jus cogens* norms. Wuerth, *supra* note 30. She provides a careful analysis of relevant case law to demonstrate that immunity was not invoked in many of the cases that are typically cited as evidence that immunity no longer exists. *Id.* (manuscript at 26–35). These cases should therefore not necessarily be considered as evidence that the traditional custom of sovereign immunity has eroded. *Id.* (manuscript at 26). Professor Wuerth further points to cases that directly contradict *Pinochet*, including cases filed against former U.S. Secretary of Defense Donald Rumsfeld (in France), against former Chinese President Jiang (in Germany), and against former U.S. President George W. Bush (in Switzerland). *Id.* (manuscript at 22).

Even though it does not guarantee it, the absence of preemptive adjudication in the *Pinochet* case also leaves open the possibility for future legal change. In July 2012, well over a decade after the *Pinochet* decision, Switzerland's Federal Criminal Court followed it, refusing to grant immunity to Khaled Nezzar, a former Algerian minister of defense.¹²⁷ A human-rights NGO accused the Minister of committing war crimes during the Algerian War from 1992 to 2000, and two refugees from Algeria accused him of subjecting them to torture in 1993.¹²⁸ Among a number of defenses, the minister's lawyer argued that Nezzar enjoyed immunity for the period between 1992 and 1994 when he was minister of defense.¹²⁹ Even though Switzerland's Office of Foreign Affairs made clear its view that Nezzar was shielded by immunity, the court rejected the immunity claim.¹³⁰ In reaching its decision, the court cited international criminal treaties, as well as international reports from the United Nations, the Rome Statute, and one domestic judicial ruling—the *Pinochet* case.¹³¹ It stated that since *Pinochet*, immunities for former heads of state are no longer automatically guaranteed against individual responsibility in criminal matters, even for acts committed during their official activities.¹³² It is possible that more courts will follow suit, explicitly rejecting immunity and citing the custom-breaking *Pinochet* case as precedent. CIL tends to evolve slowly, and this may be particularly true for rules in which domestic courts are the main decisionmakers.¹³³

127. See Gabriella Citroni, *Swiss Court Finds No Immunity for the Former Algerian Minister of Defence Accused of War Crimes: Another Brick in the Wall of the Fight Against Impunity*, EJIL: TALK! (Aug. 15, 2012), <http://www.ejiltalk.org/swiss-court-finds-no-immunity-for-the-former-algerian-minister-of-defence-accused-of-war-crimes-another-brick-in-the-wall-of-the-fight-against-impunity> (“[T]he Federal Criminal Court undertook a different approach, following the path set forth by the House of Lords in the *Pinochet* case and . . . thus adding another brick in the wall of the fight against impunity.”).

128. *Id.*

129. Tribunal pénal fédéral [TPF] [Federal Criminal Court] July 25, 2012, BB.2011.140, para. 5.4.2 (Switz.), available at http://bstger.weblaw.ch/pdf/20120725_BB_2011_140.pdf.

130. *Id.* para. E.

131. *Id.* para. 5.35. The court's approach highlights the multiple sources of state practice, and suggests numerous pathways by which CIL can develop. Cf. Wuerth, *supra* note 10 (suggesting that both judicial and executive actions should be considered in determining CIL).

132. Tribunal pénal fédéral, BB.2011.140, para. 5.35.

133. The withdrawal of immunity for commercial conduct occurred gradually over the twentieth century. When the Italian Supreme Court issued the first high court decision rejecting a claim to this form of immunity in 1886, there was no world court to invalidate the decision. ELEANOR WYLLYS ALLEN, *THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS: CHIEFLY IN CONTINENTAL EUROPE* 229 (photo. reprint 2001) (1933). The next high court to reject an immunity claim was in Belgium, and it did so only in 1903, although its lower courts

Nonetheless, CIL can and does evolve in the absence of early international adjudication. It is possible that CIL would eventually evolve in the face of a contrary decision by an international court as well, but the likelihood is lower.

The substantive point should not overshadow this broader, more fundamental point about procedure: regardless of whether immunity for former heads of state is withdrawn in the future, states, and not an international court, will—through their decentralized and iterated conduct—be the deciders.

III. INTERNATIONAL JUDICIAL MINIMALISM

Despite the central tension between international adjudication and the traditional process by which CIL evolves, courts may still be able to mitigate the tension's effects.¹³⁴ They can do so by adopting a minimalist decisionmaking approach in cases of preemptive adjudication. This Part proposes one way in which the ICJ might have been more restrained in its *Germany v. Italy* decision, outlining an alternative route that would have carried less risk of impeding the evolutionary CIL process.¹³⁵ It then considers and responds to an important criticism of the minimalist approach in the international context—that it enables powerful states to shape customary international rules and to enforce them unevenly, predominantly against weaker states.

had erratically restricted immunity during the nineteenth century. *Id.* at 200–03, 206. It is debatable whether the Italian and Belgian decisions would constitute custom-breaking cases because some scholars suggest that judicial treatment of sovereign immunity claims, even at this early point, was varied. *See, e.g.*, BYERS, *supra* note 25, at 111 & nn.18–28 (stating that “history suggests that there was no general rule regulating State immunity from jurisdiction prior to restrictive immunity becoming a rule of customary international law” and identifying dates when various countries began to restrict foreign immunity). The gap of more than ten years between the first and second high-court decisions nonetheless illustrates the gradual pace at which CIL tends to evolve.

134. This proposal is particularly relevant given that a dispute regarding the sovereign immunity of foreign state officials for *jus cogens* violations is pending at the ECHR. *See Jones v. United Kingdom*, App. No. 34356/06 (Sept. 18, 2009), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-111560>.

135. For an example of such an alternative route, see Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123 (2005), which notes that “procedural minimalism as a general category should be distinguished from the subcategory of *democracy-forcing minimalism*, which involves an effort to issue narrow rulings that do not mandate ultimate outcomes but that force decisions by politically accountable actors,” *id.* at 124.

A. Judicial Minimalism in the International Context

Judicial minimalism is an approach to decisionmaking and opinion writing in which courts issue constrained, incremental rulings even when they have the option to be broad and sweeping.¹³⁶ Professor Cass Sunstein proposes that the hallmarks of minimalism are narrowness and shallowness.¹³⁷ Narrowness means that, rather than advance broad rules or principles that are intended to or could be used to guide decisionmaking in future cases, judges carefully tailor their decisions to the cases before them.¹³⁸ Shallowness means that judges refrain from grounding their decisions in general theories that can become divisive because of their potentially broader impact.¹³⁹

In the context of international adjudication and CIL, judicial minimalism exhibits these same qualities of narrowness and shallowness, but has different implications. For international courts adjudicating custom-breaking cases, judicial minimalism entails deference not to existing law or previous courts, but to the CIL process—the decentralized dynamic by which international custom emerges and changes. Judicial minimalism counsels that in cases involving custom breaking, judges should, to the extent possible, give the CIL process a chance to unfold without the interference of international courts. In *Germany v. Italy*, judicial minimalism would have led to the same ultimate holding (that Italy violated Germany’s state immunity) but on a narrower ground. If it had used a minimalist approach, the ICJ might have tailored its decision more closely to the facts of the case (narrowness) or avoided making broad theoretical claims (shallowness). Focusing on shallowness, a minimalist approach might have rejected Italy’s arguments but without taking a position on the broader issue of whether procedural rules regulating immunity

136. *See id.* at 125 (“[I]n the most difficult and controversial domains, the Court tends to choose relatively narrow and unambitious grounds. The Court has not accepted a large-scale theory of constitutional interpretation; it proceeds by building cautiously on precedent, in the fashion of common law courts.” (footnote omitted)). For a discussion of institutional minimalism and judicial minimalism, see generally Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951 (2005).

137. Sunstein, *supra* note 135, at 123.

138. *See id.* at 129 (“[Minimalist judges] do not wish to resolve other, related problems that might have relevant differences. They are willing to live with the costs and burdens of uncertainty, which they tend to prefer to the risks of premature resolution of difficult issues.”).

139. *See id.* (stating that minimalist judges “favor arguments that do not take a stand on the foundational debates in law and politics”).

conflict with substantive rules protecting *jus cogens* norms or the substantive right to reparations. This avoidance technique would have been particularly justifiable given that Italy, in its counter memorial to the court, went out of its way to retract the arguments advanced by its own courts that *jus cogens* norms prevail over rules regulating immunity. The counter memorial states:

Italy does not pretend in general terms that when confronted with a claim arising out of the violation of a *jus cogens* norm municipal courts have jurisdiction. Italy fully agrees with Germany that such a general exception to immunity does not yet find confirmation in international practice, nor can it be theoretically inferred from the *jus cogens* character of the rule violated.¹⁴⁰

Instead, Italy framed its claims in additive terms: violations of *jus cogens* when combined with denial of reparations allows for the rejection of state immunity. Even if the ICJ, in adopting this minimalist approach, were to remain mute about the general issue of whether procedural rules conflict with substantive norms, one could logically extrapolate the ICJ's position. By rejecting the additive version (violation of *jus cogens* norms plus denial of reparations equals withdrawal of immunity), the ICJ rejected the disaggregated, constituent parts (violation of *jus cogens* norms leads to withdrawal of immunity and denial of responsibility leads to withdrawal of immunity). In remaining silent, however, the ICJ would have left open some grey area. It would have, for example, preserved the option to adopt a balancing test in the future, and fostered the ambiguity necessary for CIL to develop.

The ICJ has used this type of minimalist approach before. In his review of ICJ jurisprudence involving CIL, Professor Alberto Alvarez-Jiménez notes that the ICJ sometimes chooses to avoid evaluating state practice for a given CIL. He explains,

There may be, in [the] abstract, multiple reasons for this silence, which can be either related to the early stage of development of the State practice in question, with the convenience of waiting for a future case with a more suitable factual situation, or to the judicial strategy of avoidance to leave to States the resolution of complex issues.¹⁴¹

140. Counter-Memorial of Italy, *supra* note 103, para. 4.67.

141. Alvarez-Jiménez, *supra* note 7, at 704.

Alvarez-Jiménez points to the ICJ's approach in the *Congo v. Belgium* case as one example.¹⁴² In that case, both parties agreed during the proceedings that the ICJ should determine only whether Belgium had violated the CIL of immunity rather than analyze the issue of universal jurisdiction as well.¹⁴³ Procedurally, this means that the ICJ did not have the option of deciding the universal jurisdiction issue. Nonetheless it could, as some of the judges pointed out, have discussed the question as part of its reasoning.¹⁴⁴ Some judges indeed urged their colleagues on the court to do so, but ultimately the judges refrained. Judge Oda lauded this judicial restraint because, in his words, the “law [was] not sufficiently developed.”¹⁴⁵

My argument endorsing judicial minimalism in cases of custom breaking by domestic courts is not a disguised critique that seeks the ultimate erosion of state immunity for violations of *jus cogens* norms. There are compelling reasons to support the absolute state immunity rule. Rather, this Essay's claim concerns the process by which CIL, including foundational rules such as sovereign immunity, is changed or sustained. The legitimacy of international law arguably rests on a diversity of avenues by which it is created and recreated, avenues that include not simply treaty negotiations and judgments by international courts but also the decentralized decisions of individual states.

B. *Elephants in the Room: The Power Critique*

The proposal that international courts adopt judicial minimalism in the context of custom breaking is likely to face some of the same critiques that apply to the endorsement of judicial minimalism in the United States, including that minimalism is incoherent or simply a “grab-bag” approach.¹⁴⁶ As Professor Tara Smith notes, “[w]hat is

142. *Id.* at 705.

143. See *Congo v. Belgium*, Judgment, 2002 I.C.J. 3, para. 43 (Feb. 14) (“[T]he Court is . . . not entitled to decide upon questions not asked of it Thus in the present case the Court may not rule, in the operative part of its Judgment, on the question whether the disputed arrest warrant, issued by the Belgian investigating judge in exercise of his purported universal jurisdiction, complied in that regard with the rules and principles of international law governing the jurisdiction of national courts.”).

144. See *id.* (“While the Court is thus not entitled to decide upon questions not asked of it, the *non ultra petita* rule nonetheless cannot preclude the Court from addressing certain legal points in its reasoning.”).

145. Alvarez-Jiménez, *supra* note 7, at 705 (quoting *Congo v. Belgium*, Judgment, 2002 I.C.J. 3, para. 12 (dissenting opinion of Judge Oda)).

146. See Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347, 352 (2010) (“Minimalism, in practice, serves as a placeholder for a grab-bag of

appropriately minimal in any sphere is dependent on judgments concerning the value of what is being minimized.”¹⁴⁷ This Essay’s proposal will also likely face some critiques that are unique to the international system. The most compelling of these critiques holds that restraint by the ICJ and deference to CIL processes risk creating a *carte blanche* for power politics.¹⁴⁸ Whereas the ICJ safeguards sovereign equality, CIL, some argue, heavily favors powerful states.¹⁴⁹ If rules regulating state immunity are left to states to shape, then one outcome is a certain bet: the Belgiums of the world will reject the immunity of smaller, weaker states, but not of the United Kingdom or the United States. According to this critique, any shift in the CIL of state immunity will reflect the interests and ideals of powerful states only.¹⁵⁰

There are at least three possible responses to this critique. First, the concern about powerful states unilaterally restricting the immunity of weaker states is overstated because states’ interests may align in less predictable ways. For instance, when Belgium began to pursue investigations against U.S. and Israeli officials in the 1990s, both countries threatened sanctions in retaliation.¹⁵¹ Belgium quickly narrowed the universal jurisdiction provision in its criminal code, with the effect of limiting jurisdiction not only over U.S. officials but over officials from all states, including weak ones.¹⁵² Power does matter, but states like Belgium would not necessarily be able to dictate the evolution of CIL in the absence of an international court ruling. Debates about the development of CIL, that is, may not necessarily take the form of the powerful against the weak.

desiderata rather than as a genuine method of decision-making that carves out a definite and distinctive type of guidance.”).

147. *Id.* at 364.

148. *See* Kelly, *supra* note 5, at 542 (explaining how the CIL process does not ensure compliance and “provides only ‘paper,’ and not viable, norms, which vary from culture to culture”).

149. *See id.* at 541–42 (arguing that “CIL theory is used by powerful nations to conjure up exceptions to fundamental norms such as the prohibition on the use of force in the Charter of the United Nations,” and that “[t]he CIL process cannot generate norms perceived as legitimate when there is conflict about these norms or their formulation”).

150. The trend in universal jurisdiction cases attests to this likelihood. *See* Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT’L L. 1, 9 (2011) (finding that, generally, defendants from weaker states do not protest prosecutions that are based on universal jurisdiction).

151. *Id.* at 30–31.

152. *Id.* at 31–32.

Second, the power critique relies on the assumption that states have unitary interests, which may be too simplistic. Governments of weak states may be disadvantaged by a minimalist approach, while their domestic populations may benefit. It is unclear what constitutes “the state” or what qualifies as “state interest,” and it is therefore difficult to evaluate whether CIL is biased against weak states.

Finally, even if the critics are correct that minimalist approaches favor the powerful over the weak, early adjudication is not a better alternative. If the power argument holds, then early adjudication simply restores the traditional CIL rules that were dictated by powerful states in the first place. It does not enable the participation of weak states.

CONCLUSION

Scholars typically assume that two key functions of international courts, clarifying legal rules and facilitating the development of international law, are compatible.¹⁵³ Yet, for a certain class of cases involving custom breaking, international courts risk impeding the traditional process by which CIL evolves. International courts risk creating this effect because of the peculiarity of CIL. As is well known, CIL cannot evolve without a state willing to break from the existing customary rules. Less appreciated is the fact that it is the responses of other states to the deviation, and not the deviation itself, which determine the legality of such breaks, deciding whether they mark the beginning of new legal rules. In order for CIL to change, breaks with international custom require followers. The refusal of states to follow custom breakers, however, is also important; it helps reveal that states generally support the existing rules. Whether states decide to follow a custom breaker or to adhere to traditional rules, CIL is premised on the notion that it is the states themselves that will, at least initially, be the ones to decide. International adjudication of custom-breaking cases is in tension with this core premise: it interrupts the decentralized decision-making process. To mitigate this tension, international courts should recognize the importance of state responses to breaks with custom. Where responses are minimal or entirely absent because the break from custom has recently occurred, international courts should, where possible, grant states more time.

153. *See supra* Introduction.