AN INSTRUMENT CHOICE PERSPECTIVE ON
CUSTUMARY INTERNATIONAL LAW


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ABSTRACT

Contemporary international lawmaking is characterized by a rapid growth of “soft law” instruments. Interdisciplinary studies have followed suit, purporting to frame the key question states face as a choice between soft and “hard” law. But this literature focuses on only one form of hard law—treaties—and cooperation through formal institutions. Customary international law (CIL) is barely mentioned. Other scholars dismiss CIL as increasingly irrelevant or even obsolete. Entirely missing from these debates is any consideration of whether and when states might prefer custom over treaties or soft law.

This article applies an instrument choice perspective to demonstrate custom’s continuing relevance to contemporary international lawmaking. First, we use instrument choice to identify the distinctive design features that distinguish CIL from treaties and soft law. As an ideal-type, we argue, custom is a non-negotiated, unwritten and universal form of cooperation. Second, instrument choice illuminates the constraints that limit custom to particular types of cooperation problems, which we label as custom’s “domains.” Specifically, CIL’s design features limit custom to situations in which all-states-benefit from a norm, hegemonic custom, and normative custom. Third, an instrument choice approach predicts that states will continue to prefer custom over treaties and soft law when its design features or substance offer competitive advantages over international agreements and nonbinding norms. Our instrument choice analysis thus not only predicts when custom will form, it also helps to explain several doctrinal features of custom that have long troubled scholars.

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INTRODUCTION

Contemporary international lawmaking is characterized by the rapid growth of new “soft law” instruments and a decline in the conclusion of new treaties.¹ The future of customary international law (CIL) in this changing landscape is unclear. This uncertainty is reflected in the burgeoning interdisciplinary literature on international lawmaking.

Scholars have scrutinized the design of international agreements already on the books as well as the relationship between soft law and treaties, framing their inquiries in terms of when states choose particular treaty design features or instead opt for nonbinding forms of legal cooperation. But these studies focus on only one form of hard law—treaties—and cooperation through formal institutions. Customary international law, the other traditional form of binding international law, is largely ignored.² Other scholars dismiss custom as increasingly irrelevant,³ in part because treaties have codified many legal rules that were traditionally regulated by custom,⁴ in part because treaties offer putative advantages, such as precision in language,⁵ and in part because custom is plagued by doctrinal confusion.⁶ Entirely missing from these studies is any discussion of whether—and under what circumstances—states might actually prefer custom over treaties or soft law. This article fills the gap in the literature, offering an instrument choice perspective on CIL.

Scholars who employ a rational choice paradigm have devoted significant attention to both treaties and nonbinding norms, and to their interrelationship. In the realm of treaties, studies have analyzed many aspects of the design of international agreements, from the relationship between treaty form and substance, to the institutions and monitoring

² A recent stocktaking of two decades of international law-international relations scholarship highlights the “persistent neglect” of custom as a “manifest weakness” of the field as a whole. Jeffrey L. Dunoff & Mark A. Pollack, Reviewing Two Decades of IL/IR Scholarship, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 175 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).
⁵ See Timothy Meyer, Codifying Custom, 160 U. PA. L. REV. 995, 1000 (2012) [Codifying Custom] (“codification allows states to specify more precisely what customary international law requires, thereby facilitating deeper cooperation and avoiding costly disputes over vague legal rules”); SERGE SUR, INTERNATIONAL LAW, POWER, SECURITY AND JUSTICE 171 (2010) (“Nowadays there is a tendency to mistrust custom because of its imprecision. [I] Does not [the] remarkable growth of treaties, the servant of international law, slowly lead custom down the path to comfortable retirement?”).
mechanisms that treaties create, to the flexibility tools that negotiators use to manage the risks of treaty-based cooperation.7 A different strand of rationalist scholarship explains when and why states choose nonbinding norms and the tradeoffs between soft and hard law. These studies measure “legalization” not as a binary choice but as a continuum measured by the degrees of obligation, precision and delegation in the arrangements that states negotiate.8 Using this legalization framework, scholars have examined the often complex relationship between binding and nonbinding instruments in issue areas including security, environmental regulation, trade, and the regulation of transnational corporations.9

A core contribution that links these studies is their focus on instrument choice.10 Rational states will choose the type of legalized cooperation—be it hard law, soft law or something in between—and the specific design features that further their respective preferences and interests. Although some rational choice frameworks assume that nations only pursue short-term material gains, more capacious and realistic approaches are fully compatible with the claim that states select legal instruments and their design attributes to advance a long-term preference for upholding international commitments.

Strikingly, however, the rational design, legalization and instrument choice scholarship has all but ignored CIL. In study after study, custom is barely mentioned, and why states choose custom over treaties or soft law.11 More specifically, rationalist accounts of international lawmaking have failed to consider the distinctive design features of CIL or the important questions of whether and when states might choose custom as their preferred legal instrument of cooperation over treaties and soft law.12

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11 See, e.g., Andrew Guzman, Saving Customary International Law, 27 MICH. J. INT’L L. 115, 119 (2005) (“[O]ne might ask whether the impact of CIL, whatever it may have been in the past, has faded to the point of irrelevance. After all, modern international relations have made the treaty a more important tool, relative to CIL, than it has been in the past, and there are myriad ways for states to cooperate through soft law instruments that fall short of treaties.”); Edward T. Swaine, Rational Custom, 52 DUKE L. J. 559, 621 (2002) (“customary international law, like informal agreements, may allow states a relatively moderate means of credibly committing themselves, while at the same time permitting less costly escape when the circumstances demand it”); Barbara Koremenos et al., Rational Design: Looking Back to Move Forward, 55 INT’L ORG. 1051, 1078 (2001) (the editors of a special issue on rational design refer to CIL only to note that custom should be codified “to make it more precise and to ensure that the expectations it entails are widely understood”); Hiram Chodosh, An Interpretive Theory of International Law: The Distinction Between Treaty and Customary Law, 28 VAND. J. TRANSNAT’L L. 973, 1012 (1995) (discussing the view that custom is a form of soft law).
12 A partial exception is Pierre-Hugues Verdier and Erik Voeten, Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory, 108 AM. J. INT’L L. 389 (2014). Verdier and Voeten develop a positive theory of how CIL changes over time, but do not explain, as we do in this article, whether and why states choose custom over treaties or soft law. A few other scholars have applied a rational choice approach to custom, primarily focusing on the issue of state compliance with CIL. See, e.g., Guzman, Saving Customary International Law, supra note 11; George Norman and Joel P. Trachtman, The Customary International Law Game, 99 AM J. INT’L L. 541 (2005); Jack Goldsmith and Eric Posner, The Limits of International Law (2005); Swaine, supra note 11. These scholars have not considered custom’s distinctive design features, nor have they analyzed states’ preference for custom from an instrument choice perspective.
An instrument choice perspective offers three interrelated insights that reveal custom’s continuing relevance to contemporary international lawmaking. First, the perspective identifies the distinctive design elements that distinguish CIL from treaties and soft law. Second, instrument choice illuminates the constraints that limit states’ use of custom to particular types of cooperation problems. And third, the approach predicts that states, within these constraints, will continue to prefer custom over treaties and soft law when custom’s design features or substantive norms offer competitive advantages over treaties and soft law.

We begin in Part II by considering custom’s “design features,” a term we use to describe the underlying structural characteristics of the customary international lawmaking process itself, rather than the canonical elements of custom (state practice and opinio juris) or any particular doctrine associated with CIL. Specifically, we contend that, as an ideal-type, custom is non-negotiated, unwritten, and universal—three characteristics that distinguish CIL from both treaties and soft law, which are almost always negotiated, written, and rarely universal either in negotiation or application. These design features help to explain some of custom’s peculiar doctrinal characteristics, and they cut across the doctrinal divide which is said to distinguish “traditional” and “modern” custom.

Part III considers the constraints that limit states’ recourse to CIL to particular types of cooperation problems, which we label as “domains.” Although the custom’s design features make it ill-suited to resolve many trans-border public goods or collective action problems, we argue that states can nonetheless generate custom in a range of potentially important contexts. Drawing upon numerous historical and contemporary examples, we show that the design features enable custom to be formed primarily in three situations—when all states benefit from a customary rule with low distributional costs, when powerful nations impose the custom on weaker states, and when states seek to entrench shared normative values. Outside of these three domains, or an overlap between or among them, the generation of custom is much less likely.

Part IV considers custom’s future in an international legal landscape dominated by multilateral treaties and soft law initiatives. We argue that states have an incentive to select CIL as their instrument of choice—within the constraints imposed by custom’s domains—to compete with the substantive norms or the design features of existing nonbinding norms and treaties. For example, states may use custom to “unbundle” certain negotiated aspects of treaties, especially those that preclude reservations. A state could decline to become a party to a treaty, and yet profess that some aspects of the treaty (especially those it favors) are recognized in CIL.

Our argument that custom competes with treaties and soft law shows that CIL retains its contemporary relevance, although we offer a number of observations about its
changing role in international cooperation. In particular, we argue that even when states have a preference for CIL, their ability to do so is limited by the domains that we have identified. Part V concludes.

I. THE DESIGN FEATURES OF CUSTOMARY INTERNATIONAL LAW

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

We acknowledge at the outset that these three design features—universal, unwritten and non-negotiated—are ideal types, and that treaties and soft law share these features to a limited degree. However, if one views each attribute along a spectrum, there can be little doubt that custom occupies the high end of the spectrum for each variable as compared to treaties and soft law. Moreover, custom’s design features are fixed. Although states are largely free to select the design features of treaties and soft law which best suit their purposes, they generally lack the power to do so with respect to custom. In the discussion that follows, we first discuss each characteristic separately and then consider potential objections to this typology.

A. Universal

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

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

16 See supra note 13.
18 See Mark E. Villiger, Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources 62 (2nd ed. 1997) (“All states participate as equals in the formative process of customary law…”); Michael Byers, Custom, Power and the Power of Rules 75 (1999) (“…all States, from the weakest to the most powerful, have an equal entitlement to participate in the process of customary international law.”).
ratification. Indicia of widespread state support for soft law are found in more diverse sources, such as votes for resolutions in international organizations, endorsements by government officials, campaigns by civil society groups, and nonbinding agreements. Yet there is no accepted method of evaluating these practices to determine the extensiveness of international support for nonbinding norms.

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

Three legal doctrines buttress custom’s universal aspirations—the position of new states; the status of persistent objectors; and assertions of regional custom. Each of these doctrines, properly understood, reinforces custom’s universalist tendencies. First, it is “widely accepted that a new State is bound by all rules of general customary international law which existed at the time that State came into being,” although such a state had no opportunity to support, acquiesce in, or oppose these preexisting customs. The rationales offered to justify this rule range from a benign desire to preserve stability in international relations to a nefarious effort to shackle “uncivilized” peoples emerging from colonialism to legal rules previously developed by and benefiting Western powers. Whatever the explanation, there has been little if any pushback against this doctrine from the dozens of new nations that have emerged since the end of the Second World War. When paired with the well-settled (although recently challenged) prohibition on unilateral withdrawal from extant custom, the result is a marked geographic expansion of customary law’s reach.

The notion that states could be bound though acquiescence did not sit well with positivist scholars, for whom consent was the lynchpin of international law’s legitimacy. The idea of the persistent objector arose to alleviate these anxieties. According to the doctrine’s canonical definition, a nation that regularly and vociferously opposes an
emerging custom will, if the new rule eventually forms, not be bound by the rule in its
relations with other states. The option to object is open to all nations, consistent with the
rules applicable to the formation of custom.

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

Why might this be the case? One answer is found in the principle of reciprocity,
which disadvantages putative objectors by forcing them to bear the new custom’s burdens
without enjoying its benefits. As Michael Byers has illustrated with an example from the
law of the sea, “[e]ven the most powerful of the maritime States—the United States, the
United Kingdom and Japan—eventually abandoned their persistent objection to the
development of the twelve-mile territorial sea as a rule of customary international law.”
They did so “at least partly as a result of coastal fishing and security concerns. Although
foreign fishing vessels and spy ships were able to operate just outside the three-mile limits
of the persistently objecting States, the objecting States’ vessels were excluded from waters
within twelve miles of other States’ coastlines.” Reciprocity, in other words,
systematically discourages persistent objection to emerging customs that involve
reciprocal rights and obligations. The doctrine in practice thus poses little if any
impediment to custom’s applicability to all nations.

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

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

One can only conclude that the Court wished to suppress regional custom, and
there is no more effective way to do so than to declare a presumption that fundamentally
disrupts the formation of such regional practices. [The ICJ] was concerned that

31 Byers, supra note 18 at 180.
32 INTERNATIONAL LAW ASSOCIATION COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL)
INTERNATIONAL LAW 27 (2000) (hereinafter “ILA Report”) (“Although some authors question the existence of
this rule, most accept it as part of current international law.”).
33 E.g., Bederman, supra note 21, at 155; Byers, supra note 18 at 181.
34 Byers, supra note 18, at 104.
35 Byers, supra note 18, at 181.
36 Reciprocity does not explain the paucity of persistent objections to emerging customary human rights
norms, for which an objecting state may have little if any interest in whether other nations follow the norm or
not. Objection to such norms may be difficult to sustain for another reason—sustained pressure from
international human rights bodies and campaigns by civil society groups. Such efforts eventually led to the
abolition of the juvenile death penalty in the United States notwithstanding that country’s persistent objection
to that norm. See, e.g., Scott Cummings, The Internationalization of Public Interest Law, 57 DUKE L.J. 891
37 Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 276-77 (Nov. 20).
development of distinctive bodies of regional rules—not just for Latin America, but perhaps also for Europe, Africa, and Asia—might unduly interfere with the universal aspirations of international law.\textsuperscript{38}

The use of procedural rules that discouraged regional custom thus “preserved the ICJ’s prerogative to declare the content of customary international law . . . for the benefit of . . . the global community at large.”\textsuperscript{39}

B. Unwritten

A second feature that distinguishes custom from treaties and nonbinding norms is that custom is an unwritten form of law. In a review of international law sources in the early years of the 20th century, Lassa Oppenheim asserted that “[t]he rules of the present international law are to a great extent not written rules, but based on custom.”\textsuperscript{40} Numerous recent studies concur that custom is unwritten law, some even labeling this as one of custom’s “defining characteristics.”\textsuperscript{41}

In contrast, the vast majority of treaties are memorialized. Drafts are circulated and marked up during negotiations, ultimately leading to the adoption of a final authoritative text that is opened for signature. Several rules and institutional features of the international legal system provide strong incentives for states to put their agreements in writing. The Vienna Convention on the Law of Treaties (VCLT)—and the benefits of its many default rules—apply only to written treaties, a limitation intended to promote predictability and legal certainty and reduce future interpretive disputes.\textsuperscript{42} In addition, treaties cannot be entrusted to a depository or included in published compendia such as the United Nations Treaty Series unless they are in written form.\textsuperscript{43} Finally, some national laws require treaties to be memorialized for various purposes.\textsuperscript{44}

Nonbinding norms too are overwhelmingly written. Dinah Shelton’s authoritative treatise identifies two types of soft law—primary and secondary—both of which are embodied in written instruments. Shelton defines primary soft law as “those normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization.”\textsuperscript{45} Examples include the U.N. Standard Minimum Rules for the Treatment of Prisoners, the U.N. Standard Minimum Rules for the Administration of Juvenile Justice, the Declaration on Rights of Indigenous Peoples; and declarations adopted at the close of U.N.-sponsored human rights conferences. Secondary soft law includes “the recommendations and general

\begin{itemize}
  \item Bederman, supra note 21, at 152.
  \item Bederman, supra note 21, at 153.
  \item Roy M. Mersky & Jonathan Pratter, A Comment on the Ways and Means of Researching Customary International Law: A Half-Century After the International Law Commission’s Work, 24 INT’L J. LEGAL INFO. 302, 303 (1996); see also E. Jiménez de Arechaga, General Course in Public International Law: International Law in the Past Third of a Century 12 (1979) (customary international law is “defined as unwritten law”); Arthur Nussbaum, A Concise History of the Law of Nations 196-203 (1958) (describing the growth of “written law” at the expense of custom); Hugh Thirlway, International Customary Law and Codification (1972) (“the essence of customary law is that it is lex non-scripta”); Villiger, supra note 18 at 15, 102-103 (defining customary law as “unwritten” or “jus non-scriptum”); ILA Report, supra note 32 at 63 (“[T]he essence of customary law is that it is the unwritten manifestation of the will of the international community as a whole…”).
  \item Case Act, 1 U.S.C. § 112b (2012).
\end{itemize}
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These illustrations reveal that primary and secondary soft law come in many shapes and sizes, but one feature that unites all of these examples is their written form. To be sure, written documents often provide evidence—sometimes the best evidence—of state practice and opinio juris. Yet references to written materials to prove these elements does not transform custom into written law. Rather, they further underscore the differences between custom on the one hand treaties and soft law on the other.

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

In addition, some treaties codify existing customary rules or crystalize the formation of new custom, with the result that the same norm exists in both sources of international law. This overlap between treaties and custom does not, however, render the latter as written law. To the contrary, treaty and custom remain separate sources of obligation. As we later explain, the enduring separation of these sources is particularly important for non-ratifying countries and for states parties that later withdraw from a treaty that embodies a customary rule.

C. Non-negotiated

A third distinctive characteristic of custom is that it is not negotiated in the manner of treaties and soft law. Commentators describe the practice that produces custom as “informal, haphazard, not deliberate, even partly unintentional and fortuitous” as well as “unstructured and slow.” Even scholars who perceive some order in this chaos

46 Id. at 452.
47 Mersky & Pratter, supra note 41 at 303-04 (quoting and translating Serge Sur, Sources du Droit International—La Coutume, 1 Juris-Classeur Du Droit International, Fascicule 13, p.4 (1989); see also Bederman, supra note 21, at 164 (“CIL norms do not...ever have textual determinacy” unless and until they are “codified or embedded in authoritative decisions”); Maurice H. Mendelson, The Formation of Customary International Law, 272 RECUEIL DES COURS 155, 172 (1998) (“[t]he characteristic of [custom] is that it is not just unwritten, it is informal”).
48 MALCOLM N. SHAW, INTERNATIONAL LAW 78 (5th ed. 2003) (“[t]he obvious way to find out how countries are behaving is to read the newspapers, consult historical records, listen to what government authorities are saying, and peruse the many official publications”).
49 Bederman, supra note 21, at 145.
50 KAROL WOLFEK, CUSTOM IN PRESENT INTERNATIONAL LAW 71 (2d ed. 1993); R.Y. Jennings, The Progressive Development of International Law, 24 BRIT. Y.B. INT’L L. 301, 303-04 (1947); see also North Sea Continental Shelf Case (Denmark and the Netherlands v. Germany), 1969 I.C.J. 3, 41 (Feb. 20) (inferring the existence of a general custom from a treaty “is not lightly to be regarded as having been attained”).
51 See, e.g., LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 34 (2d. ed. 1979). See also Meyer, Codifying Custom, supra note 5 at 1023 (“The process of claiming that a particular state practice represents a customary rule, as opposed to merely a behavioral regularity, is itself a tacit bargaining process. But it is a process that is relatively unstructured. There are no firm, objectively verifiable rules as to precisely when a putative rule of customary international law is ripe for acceptance by states or has passed into the law. Not so with treaties.”); DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 192, 203 (2010) (customary law is “not created through purposeful acts of law-making”); GOLDSMITH &
characterize custom as emerging from a “struggle for law reflected in exchanges of “signals, cues, bids, and responses””\textsuperscript{52} among states “competing in a marketplace of rules.””\textsuperscript{53} Custom, in other words, is formed by iterated claims and defenses in which some “groups of states may ‘bid’ new norms, while others may object, and yet other countries may simply remain silent and so acquiesce.””\textsuperscript{54}

This process does not involve negotiation, which is commonly defined as a “formal discussion between people who are trying to reach an agreement.””\textsuperscript{55} Custom is not produced by a formal discussion or exchange of views. In fact, the state practice that serves as its basis may not even be motivated by a desire to reach agreement.”\textsuperscript{56}

Many negotiations over legal instruments involve another element as well: bargaining. Negotiation over treaties, for example, often involves competing demands and concessions in which the parties trade various aspects of the form and substance of the agreement. Consider multilateral conventions that regulate global public goods or club goods. Most of these agreements contain carefully crafted compromises often hashed out in exquisite detail among cross-cutting alliances.”\textsuperscript{57} A group of states may give up a preferred position in one section of a treaty (or in one treaty in a nested treaty regime, such as the WTO) in exchange for benefits in another section. Or a party may agree to less favorable substantive rules only if those rules are phrased very broadly or if the treaty includes express exit or escape clauses.”\textsuperscript{58} These exchanges expand the zone of agreement, facilitating the resolution of “[m]ultilateral coordination problems [that] cannot easily be solved in the informal, unstructured, and decentralized manner typically associated with customary international law.””\textsuperscript{59}

Custom also generally arises on a rule by rule basis. State practice and 	extit{opinio juris} focus on a single, discrete legal issue, often expressed at a high level of generality, rather than a fully fleshed out group of norms with carefully delineated contours and exceptions. This partly reflects the largely unwritten nature of custom, which increases the cost and reduces the efficacy of establishing multiple related customs at the same time. But it also makes custom a useful tool for general international rules that eschew country-specific or case-specific tailoring. As Bradley and Gulati assert with reference to the custom of diplomatic immunity, “[i]f nations can assume that the same rules of diplomatic immunity apply, no matter where, then there will be no need to negotiate specific rules every time a diplomatic mission is established in a new country.””\textsuperscript{60}

One potential objection to our claim that custom is non-negotiated arises from the widely-held view that U.N. General Assembly resolutions are evidence of customary international law. These resolutions are sometimes the subject of intensive negotiations among dozens of countries, including on-the-record debates, bargaining among state representatives, and attempts to reach agreement on a written text. In 2013, for example,

\textsuperscript{52} Bederman, supra note 21, at 165 (quotation marks omitted) (citing Thomas M. Franck, Legitimacy in the International System, 82 AM. J. INT’L L. 705, 725 (1988).

\textsuperscript{53} Id. at 150.

\textsuperscript{54} Id. at 143.


\textsuperscript{56} E.g., Bradley & Gulati, supra note 29, at 204 (“the rules of CIL do not arise from express negotiation”).

\textsuperscript{57} E.g., Byers, supra note 18, at 170 (describing treaties as “setting out a series of closely related rights and obligations in written form”).


\textsuperscript{59} GOLDSMITH & POSNER, supra note 12 at 37.

\textsuperscript{60} Bradley and Gulati, supra note 29, at 247.
If such resolutions were in themselves binding as CIL, our claim about that
source’s distinctive features would be difficult to sustain. Although a few scholars have
asserted that some General Assembly resolutions create “instant custom,”63 such a claim is
now discredited. Rather, it is widely agreed that General Assembly resolutions provide
only evidence of CIL, with the weight of that evidence dependent upon factors such as
voting patterns, express reference custom in the text, and, most importantly, whether legal
norms referred to in the resolution are subsequently reinforced by other indicia of state
practice and opinio juris.64 In addition, structural limitations constrain opportunities for
negotiation of General Assembly resolutions. The Assembly and its Main Committee
include all U.N. members. Negotiation on this scale is unwieldy, reducing the ability of
individual states to influence the drafting of language that describes the resolution’s
relationship to extant or emerging custom.65

A second potential objection to custom as non-negotiated relates to the use of
treaties as evidence of custom.66 Some treaties are intended to codify preexisting custom,
rendering it less vague in part by memorializing it.67 Such treaties may then serve as
evidence of the content of the customary norm, meaning that the negotiation of the treaty
is potentially also a negotiation about the content of custom.68 Yet states have an incentive
to continue to promote the customary norm even after the conclusion of the treaty because
the norm binds all states, even those not party to the treaty.69

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

Seen from this perspective, the distinction between custom and treaties may seem
quite thin, in particular with regard to the comparatively non-negotiated character of
custom. José Alvarez succinctly captures this view, arguing that many multilateral
codification conferences are “international lawmaking fora for the purposes of not one but
two potential sources of international obligation”— treaty-making and “the elaboration of

62 See Dominic Rushe, UN Advances Surveillance Resolution Reaffirming “human right to privacy,” THE
GUARDIAN (Nov. 26, 2013), http://www.theguardian.com/world/2013/nov/26/un-surveillance-resolution-
human-right-privacy.
63 See, e.g., Bin Cheng, United Nations Resolutions on Outer Space: “Instant” International Customary
Law? 5 IND. J. INT’L L. 23 (1965); see generally, F. Blaine Sloan, The Binding Force of a ‘Recommendation’
64 E.g., WOLFEK, supra note 50, at 83-85; Michael P. Scharf, Seizing the “Grotian Moment”: Accelerated
Formation of Customary International Law in Times of Fundamental Change, 43 CORNELL INT’L L.J. 439, 447
(2010); D’AMATO, supra note 19 at 78-79; Bruno Simma, International Human Rights and General
International Law: A Comparative Analysis, in IV-2 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW
65 See Stephen M. Schwebel, The Effect of Resolutions of the U.N. General Assembly on Customary
International Law, 73 AM. SOC’y INT’L L. PROC. 301, 302 (1979) (“[N]oting that U.N. General Assembly votes
are often cast “casually” and without the intention that the “resolution is law.”).
66 See generally Villiger, supra note 18 (exploring in detail the relationship between custom and treaties).
67 See supra note 5.
68 Cf. Meyer, Codifying Custom, supra note 5 at 1022 (arguing that “states use treaties, and the explicit
bargaining processes through which treaties are made, to shape customary rules in a way that works to their
individual benefit”).
69 See infra text at notes 154 -169 (describing the relationship between treaties and custom).
codified custom.” Aware of this double function, states participating in such conferences employ “conscious stratagems for reaffirming, modifying, or elaborating codified custom.” This new form of creating custom, Alvarez contends, “responds to states’ contemporary needs for a more rapid, less vague, and deliberative process for the establishment of preferably written and clear global rules.”

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

To the extent that treaties do articulate customary norms it is often because they reflect preexisting norms of customary law, like pacta sunt servanda. The subsequent treaty does not render the preexisting custom negotiated. To the contrary, the act of codification often changes the content of rule for the treaty but not for its customary law antecedent. Codification treaties generally “lay down the customary rule in a more precise and systematic manner,” and the “[j]us scriptum may cure omissions, eliminate anachronisms, introduce recent doctrinal findings, or even consider the eventual enforcement (or adjudication) of the written rule. As a result, codification contains a creative element and regularly entails a certain amount of change.”

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

70 JOSÉ ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 390 (2005) [INTERNATIONAL ORGANIZATIONS]
71 Id. at 387.
72 See Villiger, supra note 18 at 103 (quoting R.Y. Jennings, What is International Law and How do We Tell it When We See it? in 37 SCHWEIZERISCHES JAHRBUCH FÜR INTERNATIONALS RECHT 57, 62 (1981)).
74 Villiger, supra note 18 at 104.
75 ALVAREZ, INTERNATIONAL ORGANIZATIONS, supra note 70at 276 (“Invitations to join in multilateral treaty-making efforts [by international organizations] are today regarded as matters of sovereign right, unless the treaty is intended to be of merely regional interest”).
76 See, e.g., David Sheffer & Caroline Kaeb, The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute, 29 BERK. J. INT’L L. 334, 348-353 (2011) (“The Rome Statute is a negotiated treaty of considerable complexity designed to govern only the ICC. The Rome Statute in its entirety was never intended to reflect customary international law. Relatively few of the provisions of the Rome Statute merit that rigorous categorization.”); see also infra text at notes 157-59 (discussing controversy about
We anticipate a number of objections to our claim that CIL has three essential structural characteristics, which we label as custom’s design features. Positivist international law scholars may protest that we give insufficient attention to state practice, *opinio juris* and canonical legal doctrines associated with CIL. We agree that these topics are central to understanding when states choose custom over treaties and soft law. However, we see these doctrines—both in their traditional form and as re-envisioned by modern approaches to custom—as products of the three overarching attributes we identify, and thus as open to interrogation where they deviate from those attributes. Indeed, analyzing custom from the perspective of its design features illuminates potential explanations for longstanding areas of doctrinal confusion, as well as topics, such as the persistent objector and regional custom, that garner significant attention in legal treatises but are rarely followed in practice.

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

II. CUSTOM’S DOMAINS

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

A. Custom that Benefits All States

States will use a non-negotiated, universal, and unwritten form of legalized cooperation to create rules from which all states benefit. Because such rules advantage all nations in relatively equal measure regardless of their size, economic might, or military power, they have few distributional consequences and reinforce the foundational principle of sovereign equality. Custom of this variety often arises from areas of interstate behavior using some provisions of the United Nations Convention on the Law of the Sea as evidence of customary international law.

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77 See supra note 13.

78 Customary rules that benefit all states may, of course, disadvantage many non-state entities including private individuals and firms, colonies, indigenous peoples, political entities that aspire to statehood or firms parties who trade with government entities.
that were previously unregulated by any international rules, and it is comprised of legal norms that are articulated at a high level of generality.

The three distinctive features of custom identified in Part II facilitate the generation of this category of international norms. Negotiation is unnecessary because states benefit from the rules as such without the need to make specific demands and concessions. Unwritten practice suffices to engender consensus about general rules that lack tailored or detailed provisions. Indeed, the unwritten character of custom helps to secure states’ agreement to a legal norm articulated at a high level of generality by deferring potential disputes over specific interpretations or applications. Universality means that states can predict that other nations will be bound to the rule, which may constrain self-interested behavior in the future when some states face strong incentives to defect.

Many venerable rules of international law are the product of all-states-benefit custom. All nations gain from having predetermined methods of communicating with each other through representatives without the fear of arrest or civil suits related to the officials’ duties. Customary law thus provides for the immunity of diplomats and consular officials. Other examples include *pacta sunt servana*, territorial prescriptive jurisdiction, the prohibition of piracy, and the immunity of states from suit in foreign courts over sovereign or public acts (*jure imperii*). Two additional illustrations from the law of the sea and outer space help to illuminate the contours of this category of custom.

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

> all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation. In places where no local authority exists, where the subjects of all states meet upon a footing of entire equality and independence, no one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another.81

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

> reciprocal respect for the exclusive jurisdiction of states over their ships provided a sort of state-to-state equality of opportunity. All states met upon equal footing on the high seas and could make free use of the sea for maximum benefit, but no state could independently impose its legislative will upon the modalities of use.82

Turning from the oceans to the heavens, the universal recognition that “outer space is unsusceptible to national or private appropriation” aided rapid acceptance of the non-appropriation principle—a prohibition of territorial occupation or acquisition—as the...
customary ground norm for future activities in space.\textsuperscript{83} The principle has benefitted all states, facilitating “the orderly development of space activities for more than forty years and . . . effectively prevent[ing] a colonial race in the high frontier.”\textsuperscript{84} To be sure, disagreements have arisen at the margins, in particular over the upper extent of the earth’s atmosphere. But consistent with our theory, the contending positions over these boundary issues have been advanced, and compromises achieved, via multilateral treaties and soft law, not by challenges to the customary non-appropriation principle as such.\textsuperscript{85}

In sum, the all-states-benefit principle explains the formation of many foundational rules of customary international law. But it also sheds light on why custom plays only a limited role other areas of interstate cooperation. Many important problems faced by the international community involve difficult and contentious questions of how to distribute the benefits and burdens of cooperation among differently situated states. If governments perceive that distributive effects of an international rule are high, unwritten and non-negotiated custom will serve as a poor alternative to treaties and soft law, where specific quid pro quo trade-offs can be worked out, or finely-tuned language can be negotiated, to suit all parties at the table. Climate change and other global environmental problems are prime examples. In these contexts, to the extent custom forms at all, it will do so around highly abstract norms that leave distributive questions to future negotiations. For example, customary rules of international environmental law tend to be extremely broad and open-ended—what Dan Bodansky describes as a “common ethical framework.” They also tend to be derived from soft law and treaties, which allow states to shape rules with distributional consequences in mind.\textsuperscript{86}

As explained above, the unwritten character of all-states-benefit custom means that the resulting legal rules are often amorphous and malleable. This facilitates widespread initial agreement to a rule while giving states leeway to assert their preferred interpretation when applying that rule to specific contexts or new circumstances. To be sure, no rule is entirely free from distributional consequences. As general rules become increasingly particularized in response to these claims, however, distributional issues often become more acute. Custom’s distinctive features make it far less useful for resolving these distributional controversies. Instead, states attempt to resolve these concerns through treaty negotiations and codification exercises. Consistent with the argument advanced here, Tim Meyer has shown that efforts to codify preexisting custom is “often driven by distributional concerns.”\textsuperscript{87} This highlights an important corollary to our theory—over time, all-states-benefit custom tends to become more contentious as it is applied to new circumstances, increasing the likelihood that states will turn to treaty-making or codification to resolve disagreements over the norm. As we explain in Part IV, however, all-states-benefit custom remains relevant even after the norm have been codified.

The history of sovereign immunity illustrates this trajectory. Early domestic suits against foreign states were often brought against state-owned maritime vessels. The doctrine of absolute immunity thus benefited countries with large navies and merchant marines, which were immune from suit.\textsuperscript{88} On the other hand, private firms and individuals

\textsuperscript{84} Id.
\textsuperscript{85} Id. at 51-53 (analyzing 1976 Bogota Declaration in which eight equatorial states asserted sovereignty over the geostationary earth orbit, but arguing that the Declaration violates preexisting customary law and is contrary to the Outer Space Treaty).
\textsuperscript{86} BODANSKY, supra note 51 at 202-03 (arguing that customary international law is ill-suited to the elaboration of specific rules of behavior in international environmental but that custom and general principles can “frame the debate,” and provide a “common ethical framework.”).
\textsuperscript{87} Meyer, Codifying Custom, supra note 3 at 997.
\textsuperscript{88} Jurisdiction of Municipal Courts over Foreign States in Actions Arising out of Their Commercial Activities, 40 YALE L. J. 786, 786 n.2 (1931) (“The doctrine [of absolute immunity] has had its principal
in these countries often had potential claims against foreign vessels, so these states bore the burden as well as the benefit of an absolute immunity rule. As states become more significant economic actors in first part of the 20th Century, the economic importance of state immunity rules increased, which magnified existing distributional effects and generated new ones. The benefits accruing to governments that nationalized private industries and the “State trading activities” of the Soviet Union and other socialist nations were particular concerns. As part as a result, many states abandoned absolute immunity in favor of a restrictive rule, which does not protect the commercial activities of foreign sovereigns. Consistent with our claim, although the absolute immunity arose with little dissent, the shift to restrictive immunity remains contested after more than a century. As one Chinese author recently explained, “developing countries, to better protect their own national interests, should continue to adhere to the principle of absolute immunity and should not follow the footsteps of the developed countries to accept the restrictive approach.”

The heightened salience of distributional costs and the collapse of consensus around absolute immunity also coincided with the growth of treaties governing this topic. Unable to secure acceptance of restrictive immunity as a customary rule, proponents of that approach turned to bilateral or regional agreements.91 Efforts to codify restrictive immunity in a global treaty have been less successful. A U.N. convention endorsing that approach was adopted in 2004, but has yet to enter into force.92

B. Hegemonic Custom

The non-negotiated, universal, and unwritten characteristics of custom also facilitate efforts by powerful states to create international rules that bind all nations. We label these rules as hegemonic custom. That powerful states play an important or even dispositive role in the formation of CIL is not a new observation, but no other scholar has (to our knowledge) linked the role of power to custom’s distinctive design features or used it to develop a theory of instrument choice for custom. Below we discuss a number of variations of hegemonic custom, identify the conditions that make it more or less likely to be accepted by other nations, and analyze when powerful states turn to treaties and soft law

development in suits in admiralty”). Not surprisingly, the United States and the United Kingdom -- both strong naval powers -- were also slow to abandon absolute immunity. Id. at 786. After World War I, the United States had the world’s largest merchant marine fleet. See Allan A. Arnold, Merchant Marine in THE UNITED STATES IN THE FIRST WORLD WAR: AN ENCYCLOPEDIA (ed. Anne Cipriano Venzon 1999). In 1926 the Supreme Court held that state-owned vessels engaged in commercial trading were entitled to immunity. Berizzi Brothers Company v. Pesaro, 271 U.S. 562 (1926). Recent scholarship has identified small capitalist as the early adopters of the restrictive approach. See Pierre-Hugues Vendier & Erik Voeten, How Does Customary International Law Change? The Case of State Immunity, 59 INT’L STUD. Q. 209, 214 (2015).

93 See e.g. CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 153-63 (transl. by P.E. Corbett) (rev. ed. 1968); WOLFKE, supra note 50 at 78 (2d ed. 1993); Byers, supra note 18 at 129-203; Charney, supra note 22 at 537; ILA Report, supra note 32 at 26.
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to bolster their efforts to promote a desired customary rule. Before proceeding, we emphasize that we do not take a position on the normative desirability of hegemonic norm creation, focusing instead on its relationship to custom’s distinctive characteristics. We take up normative issues in the paper’s conclusion.

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

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

What explains the rapid and universal acceptance of this new legal norm, advanced by the world’s most powerful maritime nation, without formal negotiations or carefully delineated treaty texts? The timing—just after the end of the Second World War—was propitious. Many nations were still recovering from that conflict and others become economically or politically dependent on the United States during the Cold War’s first decade. Both trends discouraged efforts to “challenge the [Truman] doctrine or reveal its flaws.” In addition, the new rule’s distributional costs were somewhat uncertain. Most countries lacked the resources or technological knowhow to exploit the continental shelf (by drilling for oil, for example), and such distributional costs as could be identified were partly mitigated by Truman’s promise to issue leases to foreign corporations. Arguably the most important explanation for the doctrine’s acceptance, however, was the claim by other coastal states—including two veto-wielding permanent members of the recently-created U.N. Security Council—that asserting sovereignty over their respective continental shelves was permitted by customary international law.

The credible, visible commitments to the new custom by these nations yielded a better outcome for all states than the uncertainty of no agreement, even if some governments would have preferred a different rule. Game theorists label this cooperative dynamic a “battle of the sexes.” Ed Swaine has applied this analysis to the formation of new custom. He argues that “it is at these early stages where credible commitments, backed by reputational investment in the customary international law regime, may usefully diminish uncertainty and allow coordination to be attained more rapidly and with less

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94 See infra.
95 MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 115-17 (2013).
97 SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE, supra note 95 at 116 (quoting SUZETTE V. SUAREZ, THE OUTER LIMITS OF THE CONTINENTAL SHELF: LEGAL ASPECTS OF THEIR ESTABLISHMENT 28 (2008) (further citation omitted)).
98 Id. at 116 (noting declarations by Britain, France, Mexico).
friction.”99 Announcing a customary rule “permits a state to commit to one of the equilibria and to have its representation regarded as binding.” Although Swaine does not limit his analysis to a particular type of nation, his example—the development of the three-mile territorial sea—concerns a rule backed by two powerful maritime countries, England and the United States.100

We extend Swaine’s insight by explaining how custom’s distinctive features facilitate the formation of hegemonic custom in a battle of the sexes situation. A hegemon’s credible public commitment to a new legal rule on a take-it-or-leave it basis may convince other governments that they are unlikely to obtain a more favorable rule through a treaty or soft law. Weaker states in particular may conclude that resistance is not worth the effort (since, by definition, the proffered custom is better than none), or they may see little reason to try to improve the rule through negotiations in which the powerful state may have an even stronger hand. For the new custom’s proponents, this method of international norm creation is often faster and less onerous than either formal treaty-making processes or breaching existing rules. Although the “continual, overt exercise of power” is possible, it is also costly, providing hegemons with a strong incentive to legalize interstate relations in “settled rules.”101

Another type of hegemonic custom concerns rules espoused during periods when a relatively small number of powerful nations dominated international society, a state of affairs that reached its apogee in the late 19th and early 20th century and continued, to a diminishing extent, until the end of colonialism in the 1960s. Although commentators have rightly emphasized how the international rules of this period systematically harmed or ignored non-European nations and peoples,102 there were also battles over custom among Western states. Britain’s efforts to outlaw the transatlantic slave trade is the most prominent example.

Beginning in the early 1800s, Britain deployed a multi-prong strategy to stamp out the slave trade. It asserted a unilateral right to interdict vessels on the high seas, seized vessels carrying human chattel from Africa to the Americas, and sought to establish a basis in treaties and customary international law for proscribing the slave trade and enforcing that ban via interdiction.103 The outcome of these efforts, by the end of the 19th century, was a customary law prohibition on the slave trade that extended to states that had not ratified treaties proscribing that monstrous practice and, by analogy to piracy, permitted any nation to seize slaving ships.104

Unlike the Truman Proclamation, however, Britain’s ultimately successful campaign against the slave trade required sustained legal and diplomatic efforts lasting over half a century. These efforts paired the negotiation of bilateral and multilateral treaties with other European powers and the United States with soft law declarations and assertions of customary international law. The early years of the campaign met with stiff resistance. The first bilateral treaties Britain secured did not authorize interdiction, and a key British court decision in 1817 held that searching vessels on the high seas infringed the exclusive

99 Swaine, *Rational Custom*, supra note 11 at 599.
100 *Id.* at 601-02.
101 Abbott & Snidal, *supra* note 8, at 448.
jurisdiction of flag states. The result, as Michael Byers has explained, was that the British government failed in its initial “attempt to assert a putative new right of customary international law against a nonconsenting state.”

This failure did not, however, lead Britain to abandon its effort to secure a universally applicable rule. Although the later treaties it negotiated outlawed the trade and provided a limited right of interdiction, these agreements did not bind nonparties. Nevertheless, British ships continued to interdict the vessels of nations that were lawfully transporting African slaves across the Atlantic. By these actions, Britain sought to “to convert the[] practice of vigilante justice into a lawful act in accord with the larger framework of the public order of the oceans” and “a universally accepted legal norm.”

The government did so by a clever recasting of slave trade as an act of piracy, a longstanding crime under customary international law that all nations were authorized to prevent and punish.

In sum, “[t]he history of the British attempt to ban the transatlantic slave trade demonstrates how very difficult it is to achieve a customary international law right of interdiction on the high seas.” That such a custom arose notwithstanding the hurdles to its formation is due in large part to the sedulous campaign waged by the world’s then most powerful maritime nation. To be sure, other factors aided the formation of the custom, most notably that “enforcing the prescription . . . became less contentious and more widely accepted when few states had a competing interest in favor of preserving the practice.”

Yet as scholars have shown, the slave trade did not collapse under its own weight. To the contrary, governments and firms abjured the lucrative practice in response to a massive transnational social movement and sustained political and legal pressure by abolitionist nations, most notably Britain, that reframed what had been viewed as an economic transaction in humanitarian terms.

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

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

106 Byers, Policing the High Seas supra note 103, at 535; see also Martinez, supra note 104, at 1114 (“Between 1818 and 1824, it was the opinion of most, though not all, commentators and judges that, although the slave trade might be contrary to natural law, the general and customary law of nations still allowed the slave trade.”).

107 Becker, supra note 82, at 210, 208.

108 Byers, Policing the High Seas, supra note 103, at 536.


110 Becker, supra note 82, at 210.


nonconsenting states” and thus facilitating the formation of a new custom. Britain’s interdiction of vessels on the high seas and its assertions of a legal right to interdict—both unwritten practices—were crucial to maintaining pressure on non-parties to renounce the slave trade. Finally, for nations reluctant to sign a treaty, negotiations were of little use; unilateral actions and assertions of legal rights were far more important.

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

Demands by the United States and other capital-exporting nations for full compensation for expropriated alien property provides a classic example. The U.S. position was most famously asserted by U.S. Secretary State, Cordell Hull in a letter to the government of Mexico in the late 1930s. In response to Mexico’s expropriation of property owned by U.S. nationals, Hull, coining the doctrine that was to bear his name, asserted that under customary international law “no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.” According to some scholars,Secretary of State Hull accurately presented the then current position in international law in 1938 when he wrote his famous letter to the Mexican Government . . . Even though the Soviet Union and Latin American countries had challenged the rule before that time, it appears that the overwhelming practice and the prevailing legal opinion supported Hull’s position.

If there was consensus regarding the standard of full compensation, however, it was short lived. By the 1960s, the objections of Latin American states were joined by those of newly independent countries in Africa and Asia, which together turned to the UN General Assembly to assert a legal rule that was far more favorable to expropriating nations.

Yet the most extreme position advocated by capital-importing countries did not prevail. Latin American nations had long advocated a competing legal rule—the Calvo doctrine—which held that “aliens are not entitled to rights and privileges not accorded nationals, and that therefore they may seek redress for grievances only before the local authorities,” not via international arbitration or diplomatic protection. Since custom did not limit a government’s power to seize the property of citizens, this national treatment standard gave expropriating states a legal justification for not compensating foreigners either. Over time, however, expropriating countries abandoned this extreme position and accepted “that compensation must be paid for expropriated alien property as a matter of

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113 Byers, Policing the High Seas, supra note 103, at 536. For further discussion Britain’s strategy of using treaties to facilitate the development of custom, see Martinez, supra note 104, at 1118 & n.293.
114 The Secretary of State to the Mexican Ambassador (Castillo Nájera) (Washington, D.C., July 21, 1938), in 5 FOREIGN RELATIONS OF THE UNITED STATES, DIPLOMATIC PAPERS 1938, at 674, 678 (1956).
118 See Bernardo M. Cremades, Disputes Arising out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues, 59 DISP. RESOL. J. 78 (2004); see also JAMES THUO GATHII, WAR COMMERCE AND INTERNATIONAL LAW 157 (2010) (“the Calvo clause was predicated on the view that there did not exist a universal or international standard of justice that alien investors were entitled to under customary international law”) (quotations omitted).
The amount of such compensation has remained contested, however, which helps to explain why the U.S. and European nations have successfully championed the Hull doctrine in a dense web of bilateral investment treaties, which now themselves are cited as evidence of CIL.120

C. Normative Custom

States also use custom to entrench other-regarding values or goals in international law. We refer to this as “normative custom,” which we broadly define to include an assertion of a customary rule that is plausibly advanced as salutary for the international legal system as a whole. The other-regarding character of normative custom distinguishes it most obviously from hegemonic custom—although the two categories may overlap, as illustrated by the divergent motivations for abolishing the slave trade, discussed above. We do not, however, endorse any external standard for assessing whether a putatively other-regarding custom is in fact generally desirable.121 Rather, such claims will succeed or fail depending on whether other states and non-state actors accept the asserted normative custom as genuinely other-regarding. Although open-ended, this capacious conception of normative custom intuitively captures one important way that states raise and contest claims about custom in the international legal order.

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

Genocide and the death penalty provide useful opposing examples. A 1946 U.N. General Assembly Resolution prohibits genocide. The resolution was adopted by a unanimous vote and no state representative publicly maintained that genocide was permissible under international law.122 Now consider the death penalty. Many human rights advocates and some states have argued that customary international law prohibits the capital punishment. But many other governments publically refute the existence of such a custom, and some openly continue to impose and carry out death sentences, thereby preventing the norm from becoming custom through tacit consent.123 At some point, the combination of active endorsement and tacit consent may become so widespread that a custom will form except for a handful of persistent objector countries. For now, however, the death penalty as such remains permissible under CIL.

States seeking to develop normative custom may also be drawn to custom’s doctrinal features, such as its ability to bind new states not in existence when the norm

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119 Dolzer, supra note 115, at 561-62.
120 See Alavarez, A Bit on Custom, supra note 3.
121 For a recent effort to identify such an external standard, see STEVEN R. RATNER, THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW OF NATIONS 6-7 (2015) (identifying principles of justice to evaluate international legal rules as “the preservation of peace and the protection of human rights”).
developed and its ban on unilateral withdrawal. In addition, some customary rules have attained the status of *jus cogens*—non-derogable rules that can only be changed by another rule of the same stature. States seeking to develop the normative bona fides of a customary rule would be especially drawn to these features, which help entrench the norm and make it valid against all nations in ways that treaties and soft law do not.

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

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

Current controversies surrounding data privacy and mass surveillance offer a different example—the potential emergence of new normative custom. Concerns about internet privacy and the collection of data have been increasingly voiced by states and civil society organizations in various multilateral venues. The U.N. General Assembly adopted two strongly worded and widely supported resolutions on “the right to privacy in the digital age” in 2013 and 2014. The Office of the U.N. High Commissioner for Human Rights issued a report in June 2014 expressing strong support for protecting data privacy and serious concern with mass surveillance and retention of personal data. Most recently, in March 2015, the U.N. Human Rights Council adopted by consensus a resolution—supported by 55 co-sponsors from different regions—appointing a new special rapporteur to gather information on these same topics.

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130 UNGA Res. 69/166 (Dec. 18, 2014); UNGA Res. 68/167 (Dec. 18, 2013).
Regional and national developments are bolstering these emerging norms.\textsuperscript{133} Domestic legislation in a growing number of countries provides a right to data privacy.\textsuperscript{134} In a landmark ruling in 2014, the European Court of Justice invalidated the E.U.’s Data Retention Directive as an infringement of the right to private life and protection of personal data.\textsuperscript{135} The following year, special representatives of the OSCE, OAS, and African Union jointly condemned “[u]ntargeted or ‘mass’ surveillance [as] inherently disproportionate and . . . a violation of the rights to privacy and freedom of expression,”\textsuperscript{136} and the Special Rapporteur of the Inter-American Commission on Human Rights called on the U.S. “to introduce strong reforms to the NSA telephone metadata collection program.”\textsuperscript{137}

Much of the debate surrounding data privacy focuses on the application of existing human rights norms to online settings, but it is framed in a way that reiterates the legally binding nature of these norms.\textsuperscript{138} Some commentators have gone further, arguing that extant international custom specifically protects a right of data privacy.\textsuperscript{139} Whether states ultimately recognize customary law restrictions on mass data and surveillance will depend in part on whether data privacy is widely understood as a fundamental right, such that the political or moral costs of objecting to such a rule are too high to incur. We thus expect any custom that emerges from this process to rely heavily on tacit consent, with some governments taking strongly supportive positions and others acquiescing. Such a custom is also likely to be vague, deferring many questions about specific applications of the norm.

A possible impediment to the emergence of a data privacy custom would be objections by nations which, as a result of their more advanced technological capabilities, will incur higher costs of international regulation. Such opposition may, however, be weakened or even defused if a group of relatively powerful states actively supports the custom—a dynamic suggested by recent sparring over data privacy resolutions in the U.N.\textsuperscript{140} Hegemons may also turn to custom for a different reason—because they disagree with the capacious soft law norms advocated by human rights NGOs and experts and seek to develop competing (and more state-friendly) legal rules regarding data privacy.

\textsuperscript{133} See, e.g., Edward Snowden, Op-Ed., The World Says No to Surveillance, N.Y. TIMES (June 4, 2015) (noting that “institutions across Europe have ruled [mass surveillance] laws and operations [to be] illegal and imposed new restrictions on future activities”).

\textsuperscript{134} Zalnieriute, supra note 129 at 116-120, 131. [note any counter examples, possibly france?]


\textsuperscript{136} Joint Declaration on Freedom of Expression and Responses to Conflict Situations (May 4, 2015), ¶ 8(a), available at http://www.osce.org/foro/154846.


\textsuperscript{139} See Zalnieriute, supra note 129 at 116-120, 131.

\textsuperscript{140} Germany and Brazil are two relatively powerful nations that supported robust data privacy norms by sponsoring the 2013 U.N. General Assembly resolution on digital privacy. The U.S. supported the resolution, but only after it unsuccessfully lobbied for weaker language. Jonathan Horowitz and Sarah Knuckey, Major New United Nations Report Rebukes Five Eyes’ Attempts to Weaken Digital Privacy Rights, JUST SECURITY (July 23, 2014), http://justsecurity.org/13158/major-united-nations-report-rebukes-eyes-attempts-weaken-digital-privacy-rights/.
D. Custom’s Overlapping Domains

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

What we have labeled as domains might, however, also be conceptualized as a set of overlapping and interactive factors that tend to make the formation of custom more likely. For example, even if a putative customary norm has distributional impact, a stronger, visible commitment from powerful countries may nevertheless spur its formation. All other things equal, the stronger the distributional effect, the greater the projection of power required.

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

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

Tadic unquestionably had a normative component, which the Appeals Chamber emphasized in asserting that civilians in all types of armed conflicts should be protected from egregious conduct such as rape, torture, or the wanton destruction of hospitals. Yet, the Tadic rule also imposes greater costs on states that regularly experience civil wars or other armed conflicts within their borders. This may explain the earlier opposition of

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141 See Anne-Marie Slaughter and William Burke-White, An International Constitutional Moment, 43 HARV. INT’L L. J. 13-15 (2002); SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE, supra note 95 at 64-68.
142 See SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE, supra note 95 at 64-66.
143 See Orentlicher, supra note (prosecutions justified because the conduct “offended humanity itself.”).
developing countries to war crimes liability in non-international armed conflicts.\footnote{146} In addition, countries such China, India, Pakistan, and Russia opposed incorporating the Tadic rule into the International Criminal Court Statute in 1998.\footnote{147} Ultimately, this position was rejected, and the U.N. Security Council later endorsed the Tadic rule (at least tacitly) in resolutions concerning international crimes committed in Libya, Sierra Leone, and Rwanda. By 2011, opposition to Tadic had dissipated further, with India, China and Russia all voting in favor of a Security Council resolution asking the ICC to investigate the “serious violations of international humanitarian law” committed during the civil war in Libya.\footnote{148} No government criticized the referral on the grounds that potential war crimes had been committed during a non-international armed conflict.\footnote{149} According to one commentator, this silence may reflect a desire by developing countries to avoid “pick[ing] a fight with an institution established by the powerful Security Council.”\footnote{150} In sum, the distributional consequences of Tadic were overcome by the confluence of normative and hegemonic support for the rule as international custom.

III. THE FUTURE OF CUSTOM: COMPETITION WITH SOFT LAW AND TREATIES

Having described custom’s unique features and mapped its domains, we turn to a discussion of custom’s relationship to treaties and soft law. This relationship might be understood as complementary: custom is a fungible form of “soft” hard law or “hard” soft law that exists on a continuum between soft law and treaties. Such a framing suggests that custom may be rendered obsolete as unwritten international norms are codified and soft law grows in scope and complexity.\footnote{151} We recognize that custom sometimes functions as a complement to treaties or soft law, as the literatures on legalization and instrument choice at times suggests. But the distinctive characteristics of custom on the one hand, and soft law and treaties on the other, can also make them competitors, such that the demand for custom persists or even increases regardless of whether a particular subject area becomes more heavily populated by treaties and/or soft law.

Competition between custom and treaties and/or soft law occurs, we argue, along two distinct dimensions: substantive norms and design features. States dissatisfied with the substance of nonbinding norms or treaty provisions might, for example, attempt to develop alternative customary rules with different substantive content. Or states might agree with the substance of a treaty or soft law commitment but turn to custom to generate a norm with different design features, such as precluding the ability to “opt-out” by non-ratifications, treaty withdrawals, or reservations. We represent the two dimensions of the competitive dynamic between custom on the one hand and treaties and soft law in Figure

\footnote{146} Allison Marston Danner, When Courts Make Law: How International Criminal Tribunals Recast the Laws of War, 49 VAND. L. REV. 1, 44 (2006) (“The political losers from the ICTY’s revision of the laws of war appear to be developing countries. Their hostility to extending the rules to civil wars is manifest in the records from the 1949 and 1974-77 Diplomatic Conferences.”).

\footnote{147} See SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE, supra note 95 at 151-52.


\footnote{149} See SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE, supra note 95 at 152-53.

\footnote{150} Id. at 153 (quoting Danner, supra note 146, at 44).

\footnote{151} See Trachtman, The Growing Obsolescence of Customary International Law, supra note 4, (“CIL is largely superseded by treaty law and other codification; that is, only in very few circumstances are there CIL rules of law that have not been reflected in treaty or other codification”); Villiger, supra note 18 at 151 (discussing the view that “multilateral conventions tend to drive out customary law”).
The legal instruments with which custom competes appear on the x-axis, and the two modes of competition are set out on the y-axis.

The diagram depicts custom that arises later in time than those instruments. We focus on this temporal relationship—custom that follows treaties or nonbinding norms—because we view it as the more significant challenge to custom’s continuing relevance to international cooperation. To be sure, as Tim Meyer has shown, custom that develops first may also engender competition from states who prefer codified legal norms, for example in an ILC-generated convention or draft articles. It can also sometimes be difficult to determine whether a custom crystallized before or after a treaty embodying the same or similar norms. Yet if states continue to choose custom—even in areas replete with treaties or nonbinding norms—such a choice casts doubt on predictions of custom’s demise and on commentators who view custom as largely irrelevant to understanding international cooperation.

**Figure 1: Typology of Competition between Custom and Treaties/Soft Law**

<table>
<thead>
<tr>
<th>Design features</th>
<th>Substantive norms</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Treaties</strong></td>
<td>* Common heritage of mankind principle, as CIL, supplants 1958</td>
</tr>
<tr>
<td>* Geneva Conventions for the Protection of Victims of War, as CIL, bind states parties that reserve to or withdraw from the Conventions</td>
<td>Geneva High Seas Convention on the exploitation of non-living resources on the deep seabed</td>
</tr>
<tr>
<td>* Provisions of multilateral treaties, such as the Convention on the International Sale of Goods and the VCLT, bind non-parties as CIL</td>
<td>* In <em>Tadic</em>, ICTY extends war crimes to non-international armed conflicts; U.N. members later accept this as CIL</td>
</tr>
<tr>
<td>* U.S., a non-party to UNCLOS, asserts that selected UNCLOS provisions reflect CIL</td>
<td>* Claims that CIL permits humanitarian intervention even if not authorized by the UN</td>
</tr>
</tbody>
</table>

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

A. Custom in Competition with Treaties: Design Features

The top left box illustrates situations in which states use custom to modify or obviate the design features of preexisting international agreements. A prominent illustration of custom that competes with treaty design features is the protection of civilians in CIL and also in the 1949 Geneva Conventions for the Protection of Victims of War. Theodor Meron has argued that the protection of civilians in customary law is important in part because custom, unlike the Geneva Conventions, does not permit unilateral withdrawal and because “reservations to the Conventions may not affect the obligations of the parties under provisions reflecting customary law to which they would be subject independently of the Conventions.” Meron also notes that “as customary law, the norms expressed in the Conventions might be subject to a process of interpretation different from that which applies to treaties”—a further indication of custom’s continuing relevance.

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

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154 Meron, supra note 128 at 350.
155 Id.
A different use of custom to compete with treaty design features is provided by the United States’ relationship to the U.N. Convention on the Law of the Sea. The United States played a lead role in negotiating UNCLOS, but has never ratified the Convention. It has, however, consistently maintained that some aspects of the Convention—in particular, those concerning freedom of navigation—reflect customary international law. Critically for our purposes, the United States recognizes that the navigation rules embodied in these two sources of law are substantively the same. However, because UNCLOS does not permit reservations, it precludes treaty parties from opting out from any of its substantive provisions—including provisions, such as UNCLOS’ dispute settlement clauses, to which the U.S. objects. By remaining outside of the Convention while selectively adhering to some of its provisions as custom, the United States is, controversially, using CIL strategically to pick and choose those aspects of UNCLOS that benefit it while avoiding some of its provisions as custom, the United States is, controversially, using CIL strategically to pick and choose those aspects of UNCLOS that benefit it while avoiding the concomitant burdens of other clauses that it disfavors—precisely what the no reservations clause of UNCLOS was designed to prevent. In effect, the U.S. has opted for custom based on its disagreement with the treaty’s design features, creating competition between the two legal sources.

B. Custom in Competition with Treaties: Substantive Norms

The box in the upper right quadrant of Figure 1 depicts situations in which states use custom to compete with the substance of existing treaty norms. A different maritime law issue provides a “striking example[] of modification” of a treaty through custom. The 1958 Geneva Convention on the High Seas recognized the freedom of states parties to unilaterally exploit non-living resources on the deep seabed to further their national interests. Yet in the years following the Convention’s adoption, a competing principle—the deep seabed as the “common heritage of mankind”—emerged and rapidly crystalized as custom. Pursuant to this principle, a state could exploit seabed resources only as an

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157 Resolution calling for suspension of construction of artificial land formations on islands, reefs, shoals, and other features of the Spratly Islands and for a peaceful and multilateral resolution to the South China Sea territorial dispute, S. Res. 183 (May 21, 2015) (“the United States Government is . . . committed to upholding internationally lawful uses of the high seas and the Exclusive Economic Zones as well as to the related rights and freedoms in other maritime zones, including the rights of innocent passage, transit passage, and archipelagic sea lanes passage consistent with customary international law”), https://www.govtrack.us/congress/bills/114/sres183/text.


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

160 On the question of whether treaties may be modified by custom or whether they may only be modified by a treaty amendment or a new treaty, see Villiger supra note 18 at 195-204. Villiger convincingly argues that new customary rules may mean that “[t]he written rule [] accordingly undergo[es] amendment or modification or even completely pass[es] out of use.” Id. at 195; see also Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law 136-43 (2003). Interpretation of a treaty based on the subsequent practice of the parties, as provided for under Article 31.3(c) of the Vienna Convention on the Law of Treaties, may be at times difficult to distinguish from modification of a treaty via custom. See Villiger, supra note 18 at 201.

161 Villiger, supra note 18 at 201. For other examples of treaties which were renegotiated in light of subsequently-developed custom, see Nancy Kontou, The Termination and Revision of Treaties in the Light of New Customary International Law 37-107 (1994).

162 Geneva Convention on the High Seas, Art. 24 (obligating states to prevent pollution resulting from “the exploitation and exploration of the seabed and its subsoil,” thereby implicitly permitting such activities).

agent of the international community as a whole. Importantly, the common heritage idea arose in part from legal claims by non-parties to the Geneva High Seas Convention, claims that had far greater salience when framed not as treaty revision effort but as new CIL generally applicable to all nations.

The Tadic decision, discussed above in the context of custom’s overlapping domains, provides another example of substantive competition between custom and treaties. As previously explained, the Geneva Conventions themselves apply almost exclusively to international armed conflicts, leaving other military hostilities largely unregulated by the laws of (with only a few exceptions, such as the core protections of common Article 3). In Tadic, the ICTY held that certain provisions in the Conventions apply to internal armed conflicts as a matter of customary international law. In effect, the decision invoked custom to expand the substantive norms of the Geneva Conventions to both international and non-international armed conflicts. In the decades that followed, states increasingly embraced Tadic as the vehicle for a substantive expansion of the customary laws of war beyond what the Geneva Conventions themselves require. Interestingly, states had previously considered and rejected such an expansion when negotiating the Protocols to the Geneva Conventions in the 1970s.

Consider another example: humanitarian intervention. Some states have become dissatisfied with U.N. Charter’s prohibition on the unilateral use of force in response to humanitarian crises absent Security Council authorization or plausible claims of self-defense. As recent world events have made painfully clear, Security Council approval is often blocked by political differences among that body’s five veto-wielding permanent members. As discussed in greater detail below, some states have accordingly turned to customary international law, implicitly or explicitly, to justify a military response to humanitarian crises even if the Security Council fails to act. Such states are invoking custom as an alternative source of law to compete with the substantive terms of the U.N. Charter.

C. Custom in Competition with Soft Law: Design Features

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

Notwithstanding these design differences, many commentators assert that soft law’s primary relationship to custom is as a precursor for hard law. As Christine Chinkin explains this view, “[o]nce a prospective norm has been in formulated in soft form it can become a catalyst for the development of customary international law. To many commentators this is the raison d’être of soft law and its entry point into the traditional sources of law.”170 Implicit in this perspective is the belief that states become habituated to nonbinding norms over time, eventually accepting them as CIL. The canonical example is the path to custom followed by the rights in the nonbinding Universal Declaration of Human Rights.171

This perspective overlooks, however, the possibility of ongoing competition between custom and soft law. Consider, for example, the ongoing effort to ban anti-personnel land mines. The United States has signed or otherwise supported soft law instruments calling for a ban on these military devices. In 1996, the United States pledged its support for a total ban on landmines,172 five years later it supported a nonbinding declaration that “all States should strive towards the eventual elimination of anti-personnel landmines globally,”173 and in 2014 the United States announced that it would voluntarily adhere to a ban on landmines except on the Korean Peninsula.174 Yet the United States and a small group of other countries continue to maintain that they are entitled to use anti-personnel landmines.175 Consistent with that position, these nations are not parties to the Anti-Landmine Convention.176 As a result of these assertions and non-ratifications, there is no customary rule prohibiting the use of anti-personnel landmines, although some observers believe that such a rule norm is already in the process of developing, based in part on the large number of parties to the Convention.177 The United States has been

170 Christine Chinkin, Normative Development in the International Legal System, in SHELTON, supra note 45, at 32.
174 The United States has also said that it is working toward accession of the Anti-Landmine Convention, although it has no immediate plans for ratification. See Felicia Schwartz, U.S. Moves Closer to Compliance With Treaty Banning Land Mines, WALL ST. J. (Sept. 23, 2014); Ryan Koce, Final Detonation: How Customary International Law Can Trigger the End of Landmines, 103 GEO. L.J. 749, 776-77 (2015).
175 HENCKAERTS & DOSWALD-BECK, supra note 173 at 282-83. Other countries maintaining the right to use anti-personnel landmines include China, Pakistan, South Korea and Russia. Id. at note 12.
176 As of July 2015, the Anti-Landmine Convention has 162 State Parties. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211. Other non-parties include China, Cuba, Egypt, India, Israel, Pakistan, South Korea, and Russia.

willing, in other words, to endorse only nonbinding, hortatory pledges in favor of eliminating landmines, while rejecting any binding international rules.

Meanwhile, advocates supporting a global ban have sought to bind “holdouts” through custom,\(^{178}\) and abolitionist nations have signaled, in changes to U.N. General Assembly resolutions, a desire to make the ban universally-applicable.\(^{179}\) Stated differently, the core design features that distinguish soft law and custom are precisely the object of competition between countries that seek an immediate, binding prohibition on the use of antipersonnel landmines and those that seek a more flexible, longer-term pledges to work toward a reduction of those weapons.

Another possible example concerns the dispute over territorial waters in the South China Sea. China’s attempt to bolster its maritime claims by constructing artificial islands and reefs has triggered vociferous objections not only from Southeast Asian nations with competing maritime claims, but also from Japan and the United States. The later countries’ officials have asserted that China is not “observ[ing] international rules” and making unilateral claims “through means other than . . . international law.”\(^{180}\) Although the specific international obligations that China is ignoring remain unstated, one possibility is the 2002 Declaration on the Conduct of Parties in the South China Sea, in which China and other littoral countries “undertake to exercise self-restraint in the conduct of activities that would complicate or escalate disputes and affect peace and stability including . . . refraining from action of inhabiting on the presently uninhabited islands, reefs, shoals, cays, and other features . . . .”\(^{181}\) When adopted in 2002, Declaration was unquestionably nonbinding. But some commentators have suggested that it may be declaratory of an emerging regional custom.\(^{182}\) The foreign ministry’s dismissive response to its critics, in contrast, emphasizes the lack of any binding international rule (treaty or custom) that prohibits China’s actions:

> The international law has been constantly brought up by some countries when it comes to the South China Sea issue. If they did read closely the international law, then please tell us which article in the international law forbids China to carry out justified construction on its own islands and reefs?\(^{183}\)

Assuming for purposes of argument that the governments opining on the South China Sea controversy are at least implicitly sparring over the legal status of the 2002 Declaration, the statements by Japan and the United States can be seen as a bid to legalize a substantive standard of conduct that China has expressly assented to—but only as a hortatory pledge that can be easily revised or ignored. Conversely, China’s rejoinder can be viewed an attempt to limit constraints on its conduct to international rules that are

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\(^{179}\) See Kocse, *supra* note 177 at 778-79 (noting that, beginning in 2010, annual U.N. General Assembly resolutions on landmines added a provision “[c]haracterizing the desirability of attracting the adherence of all States to Convention, and determined to work strenuously towards the promotion of its universalization and norms”) (quoting G.A. Res. 69/34 at 2, U.N. Doc. A/RES/69/34 (Dec. 2, 2014).


\(^{182}\) See, e.g., Robert C. Beckman, *Legal Regimes for Cooperation in the South China Sea* 222, 228 in SECURITY AND INTERNATIONAL POLITICS IN THE SOUTH CHINA SEA: TOWARDS A COOPERATIVE MANAGEMENT REGIME (Sam Bateman & Ralf Emmers, eds. 2009) (characterizing the 2002 Declaration as confirming that territorial disputes will be resolved consistently with international law). Wendy N. Duong, *Following the Path of Oil: The Law of the Sea or Real Politik—What Good Does Law do in the South China Sea Territorial Conflict?*, 30 FORDHAM INT’L L.J. 1098, 1173 (describing 2002 Declaration as either soft or customary international law).

\(^{183}\) Hua Chunying Press Conference, *supra* note 180.
unequivocally binding. Stated differently, the core design features that distinguish soft law and custom are precisely the object of competition between the parties to the South China Sea dispute.

D. Custom in Competition with Soft Law: Substantive Norms

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

The recent controversy over whether to use force to end the atrocities in the civil war in Syria reveals the continuing competition between soft law and CIL in this area. The United Kingdom is a proponent of humanitarian intervention in Syria. The government did not, however, advance that claim by relying on the soft law R2P principle. Instead, it turned to customary international law. In a January 14, 2014 letter from the Foreign and Commonwealth Office to the House of Commons, the U.K. drew a sharp distinction between the “legal basis of humanitarian intervention and the concept of the responsibility to protect.”

Eschewing R2P, the government invoked prior interventions that it had conducted without Security Council approval—Kosovo in 1999, protecting the Kurds in Northern Iraq in 1991, and maintaining no-fly zones in Northern and Southern Iraq from 1991. The U.K. reaffirmed this position with respect to Syria, arguing that “intervention may be permitted under international law in exceptional circumstances where the UN Security Council is unwilling or unable to act in order to avert a humanitarian catastrophe.”

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184 This form of competition may be less common than competition with soft law based on design features because it can be especially difficult to form custom if soft law instruments do not substantively support it. States are better able to form custom when they control the soft law processes which create soft law instruments on a particular topic. But this kind of competition does take place, especially when powerful states disagree with the content of soft law, and when it occurs, it highlights the distinctive features of custom.


189 Id. The UK articulated three conditions for such intervention. See id. at 2-3.
A different example involves the compensation due when a state expropriates the property of foreign investors. As explained above in the context of hegemonic custom, CIL in the first half of the 20th century arguably reflected the Hull Doctrine requirement of “prompt, adequate, and effective” compensation. Developing countries attempted to change this rule in the 1960s and 1970s via the adoption of several U.N. General Assembly resolutions. By the 1980s, many commentators argued that the Hull Doctrine no longer reflected CIL.\footnote{Jason Webb Yackee, Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality, 32 Fordham Int’l L.J. 1550, 1559-64 (2009).} In response, industrialized countries, led by the U.S. and Europe, sought to codify the doctrine in a proposed multilateral convention (that ultimately failed) and in thousands of bilateral investment treaties (a far more successful endeavor).\footnote{See Jeffrey L. Dunoff, Steven R. Ratner & David Wippman, International Law: Norms, Actors, Process 97 (4th ed. 2015).} At roughly the same time, the World Bank promulgated soft law Guidelines to assist all stakeholders in the international investment regime.\footnote{World Bank Guidelines on the Treatment of Foreign Direct Investment, 31 Int’l Legal Materials 1379 (1992); see also Ibrahim Shihata, The Legal Treatment of Foreign Investment 40-43, 63-64, 88-90, 110-12 (1993).} The Guidelines require only “appropriate” compensation. But they stipulate that compensation according to the Hull Doctrine meets this standard, and they offer detailed definitions of the key terms prompt, adequate and effective. The U.S. opposed the Guidelines’ more flexible approach to compensation. In part to compete with this soft law instrument, the U.S. negotiated a series of bilateral investment treaties with developing countries. Eager to attract investment, developing nations generally accepted the terms proposed by the U.S. and other capital exporting countries, including the Hull standard for compensation.\footnote{See Andreas F. Lowenfeld, Investment Agreements and International Law, 42 Colum. J. Transnat’l L. 123, 127 (2003) (explaining that “[i]n droves the developing countries signed up to” BITs that included “rules concerning expropriation and compensation very close to the previously hated Hull Rule”).} Today, these bilateral investment treaties are, in turn, cited as evidence of custom.\footnote{Dunoff, Ratner, Wippman, supra note 191 at 96-97 (quoting from CME Czech Republic B.V. v. Czech Republic, Final Award, March 13, 2004); see also Lowenfeld, supra note 193 at 128-30; Stephen M. Schwebel, The Influence of Bilateral Investment Treaties on Customary International Law, 98 Am. Soc’y Int’l L. Proc. 27, 27 (2004) (“Customary international law governing the treatment of foreign investment has been reshaped to embody the principles of law found in more than two thousand concordant bilateral investment treaties”). The use of BITs as evidence of custom has been controversial. See generally, Alvarez, A Bit on Custom, supra note 3 at 24-27.} If such custom exists or arises in the future, it will bind all states, not just those which are parties to the BITs.

Why did the U.S. and the U.K. turn to CIL (as well as treaties) instead of engaging with the soft law precedents of the World Bank Guidelines and the R2P principle? Competition between the substantive standards of custom and nonbinding norms is surely part of the answer. By the late 1990s, the U.S. had battled developing countries over compensation for expropriated property for more than half a century. It succeeded in incorporating its preferred approach into numerous bilateral investment treaties, which it could plausibly conclude might one day be recognized as binding international custom. To support the World Bank Guidelines could have jeopardized this initiative, leading the Guidelines, not the Hull Doctrine to crystallize into CIL.

A similar strategy may explain the U.K.’s reliance on custom, rather than the R2P principle, to claim a right to unilateral humanitarian intervention absent Security Council authorization. As noted above, the latter principle was developed and championed by advocacy groups and independent experts. Although states have endorsed the principle in the abstract in a few U.N. resolutions, its substantive content remains unsettled—especially with regard to whether a prior Security Council resolution authorizing force is required. By appealing to CIL rather than soft law, the U.K. may have been seeking to assert greater control over the normative evolution of humanitarian intervention than would be possible...
if it had contributed to the more open-ended and less state-centric processes of soft law development. Humanitarian intervention also illustrates a final point about custom in competition with soft law or treaties: even if there is a competitive demand for it, states are still constrained in their use of custom as we described in Part III. An analysis based on custom’s domains suggests that because there are strong distributional effects of rules on the use force, normative or hegemonic custom are the potentially applicable domains. Humanitarian intervention has elements of both. The U.S. and the U.K. are powerful countries, supporting hegemonic custom.

The doctrine of humanitarian intervention also has a strong normative component. The United Kingdom relied in part on normative arguments in its clearest statement to date that humanitarian intervention is lawful when it contemplated the use of force against Syria in 2013. Explaining its legal position, the U.K. maintained that “[i]f action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelming humanitarian catastrophe in Syria by deterring and disrupting the further use of chemical weapons by the Syrian regime. Such a legal basis is available, under the doctrine of humanitarian intervention.”

Belgium emphasized the humanitarian ends of NATO’s mission in Kosovo when it defended the intervention as lawful before the International Court of Justice. President Obama defended potential military intervention in Syria as lawful in part by asking “[w]hat message will we send if a dictator can gas hundreds of children to death in plain sight and pay no price?” Prominent commentators have also focused on the moral necessity of acting militarily to prevent human rights atrocities, and the failure of the U.N. Security Council and individual states to act to prevent the 1994 genocide in Rwanda is often cited as demonstrating the need for humanitarian intervention. Yet it is still unclear whether this combination of hegemonic and normative custom will be successful. The lack of global hegemon and the inability of states to agree on the normative value of armed humanitarian intervention suggest that this norm may not crystalize into customary international law. This example illustrates both the incentives that states have to use custom as a competitor to treaties, but also the difficulty of using custom’s domains, especially in an increasingly multipolar world.

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195 See Ratner, supra note 121 (discussing humanitarian intervention in moral terms); see also Ratner’s exchange with Dapo Akande on EJIL.Talk!, available at: http://www.ejiltalk.org/introducing-the-thin-justice-of-international-law/#comments.


201 Force was not used in Syria in 2013 and the NATO bombing of Kosovo was condemned by some states, including Russia, China, South Africa, Namibia, and Gabon. Anne-Sophie Massa, Does Humanitarian Intervention Serve Human Rights? The Case of Kosovo, AMSTERDAM LAW FORUM, [S.I.], v. 1, n. 2, p. 49-60, Jan. 2009. ISSN 1876-8156, available at http://amsterdamlawforum.org/article/view/63/120 (last visited May 21, 2015). Russia may well have changed its position in light of events in South Ossetia and Crimea, which may, in turn, make humanitarian intervention less attractive to countries fearful of Russia’s (apparently) growing territorial ambitions. Chris Borgen, Kosovo, South Ossetia, and Crimea: the Legal Rhetoric of Intervention, Recognition, and Annexation, OPINIO JURIS (APRIL 2, 2014, 8:04 P.M.), available at: http://opiniojuris.org/2014/04/02/kosovo-south-ossetia-crimea-legal-rhetoric-intervention-recognition-annexation/.
IV. CONCLUSION

What is the place of customary international law in the changing landscape of modern international lawmaking? Notwithstanding widespread predictions that CIL is dying, and occasional efforts to revive or reform it, there has been surprisingly little discussion of the circumstances under which states prefer custom over either treaties or soft law. Using an instrument choice analysis, we first identify the distinctive design features of custom. Unlike both treaties and soft law, custom as an ideal type is universal, unwritten, and non-negotiated. These features of custom make it an unusual, even odd, form of lawmaking with a limited but nevertheless important range of applications.

CIL’s design features constrain states’ recourse to CIL primarily to three “domains,” which we term all-states-benefit custom, hegemonic custom, and normative custom. As a broad array of examples illustrate, these cooperation problems most lend themselves to states creating universally applicable international rules without negotiating their content or memorializing their terms in writing. The three domains might also be conceptualized as a set of potentially overlapping factors which make the formation of CIL more likely.

Describing custom’s domains does not exhaust an instrument choice analysis, however, because it leaves unaddressed the question of when states have the incentive to create CIL. Although commentators have argued that states’ demand for custom is declining in an age of soft law and codified treaties, we argue that states will continue to choose CIL when they prefer custom’s design features or its substantive rules to those of existing international agreements or nonbinding norms. We offer numerous examples to illustrate that the continuing competition between CIL on the one hand, and soft law and treaties on the other, creates an ongoing incentive for states to forge international law through custom, although their ability to do so is limited by custom’s domains. In the end, the future of custom depends on the ability of powerful states (or groups of like-minded countries) to overcome distributional differences or to promote legal norms with a compelling normative content.