DYNAMIC CONTENT: THE STRATEGIC CONTINGENCY OF INTERNATIONAL LAW*

It is an oft-repeated maxim that international law has undergone vast change in the modern era.[1] While it is self-evident that the rhetoric and preoccupations of international lawyers have indeed transformed from the positivist utterances of nineteenth century European diplomats, the discipline of international law has yet to articulate an adequate causal explanation for actual continuity and change in the legal expectations and obligations of the international community. The deleterious effects of this under-theorization are substantial. International law is stuck in a morass of contested doctrinal description.[2] Its content, effect, and very existence are grist for incessant academic debate and political wrangling.[3]

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1. *See, e.g.*, Michael Kirby, International Law: A Tectonic Change in the Legal Scene, Address before the Joint Meeting of the American Society of International Law and the Australia-New Zealand Society of International Law, *at* http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_interlaw.htm (last visited November 24, 2003) (justice of the High Court of Australia describing the evolution and growth of international human rights, commercial, and intellectual property law); THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 9–14 (2002) (detailing the twentieth century transition from a permissive use of force regime to United Nations Charter proscriptions); Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 640 (2000) (describing the changing jurisprudence of customary international law).

2. *See* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 450–52 (2000) (describing the disarray of international legal theory); Goldsmith & Posner, *supra* note 1, at 641 (describing customary international law as an epiphenomenon of rational state behavior); John H.E. Fried, *International Law—Neither Orphan Nor Harlot, Neither Jailer Nor Never-Never Land*, *in* INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 25, 25–27 (Charlotte Ku & Paul F. Diehl eds., 1998) (describing international law as the "whole panorama" of international norms and institutions and describing its primary criticisms).

3. *See generally* Kelly, *supra* note 2, at 451–84 ("Under the indeterminate and manipulable theory of CIL [Customary International Law], all . . . positions are tenable. CIL is then a matter of taste. As such, it cannot function as a legitimate source of substantive legal norms in a decentralized world of nations without a broad base of shared values.").

Indeed, the catalyst for the entire discipline of modern International Relations (IR) was the perceived moral and intellectual "great failure" of the international legal program during the period between the two world wars.[4] The human cataclysm of World War II, followed by the predominance of geo-political security issues during the Cold War era, prompted a great number of influential political and academic commentators to adopt realist assumptions which question whether international law is anything more substantial than an epiphenomenal symptom of liberal decadence.[5] More recently, the international acrimony associated with the United States' decision to invade Iraq, and centered at the United Nations (UN), has invigorated a strong current within the Bush administration for formal declaration of international law's irrelevance to the "problems of our time."[6]

Even among legal practitioners who accept customary international law (CIL) at face value, disagreement regarding its content is interminable.[7] While there is a common doctrinal terminology recognized by most international lawyers, these conventions are so malleable and theoretically self-contained that they often seem more a source of further tension in the law rather than grounds for media-

4. *See* Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 17, 26–27 (Michael Byers ed., 2000) (describing how the disillusioning experience of Weimar and the League of Nations led several prominent European refugees to champion a revival of realism in American academia and foreign policy following World War II); *see also* EDWARD H. CARR, THE TWENTY YEARS' CRISIS (1940) (describing the political and normative failure of the legal idealist program and consequent emergence of modern realism).

5. *E.g.*, CARR, *supra* note 4, 102–12 ("The exposure of the real basis of the professedly abstract principles commonly invoked in international politics is the most damning and most convincing part of the realist indictment of utopianism. . . . The charge is not that human beings fail to live up to their principles. . . . What matters is that these supposedly absolute and universal principles were not principles at all, but the unconscious reflections of national policy based on a particular interpretation of national interest at a particular time."); Susan Strange, *Cave! hic Dragones: A Critique of Regime Analysis*, *in* INTERNATIONAL REGIMES 337, 338–42 (Stephen D. Krasner ed., 1983) (calling the emphasis on regime analysis in American international legal circles a "special form of nonterritorial imperialism . . . that many American academics, brought up as liberals and internationalists, find . . . hard to recognize"); Goldsmith & Posner, *supra* note 1, at 640–41, 660–63 (contrasting the deficiencies of the positivist approach to customary international law to a "new" realist, rational choice approach).

6. *Cf.* George W. Bush, Address to the Nation on Iraq from Cincinnati, Ohio, 38 WEEKLY COMP. PRES. DOC. 1716, 1719–20 (Oct. 7, 2002), *available at* http://www.cbsnews.com/stories/2002/10/07/national/main524627.shtml (last visited November 15, 2003) (asserting that the UN's failure to support U.S. action against Iraq would demonstrate the organization's irrelevance to "the problems of our time") [hereinafter Address to the Nation].

7. *See supra* note 3 and accompanying text.

tion.[8] Lacking the tools to articulate or falsify causal claims about international law, legal publicists tend to invoke the term as a universal justifier for personal normative preferences. The effect of this cumulative contestation has been to give international law an air of conceptual abstraction that significantly undermines its credibility as a behavior-channeling factor in world politics.

Yet, international law remains an intuitively important concept. While IR scholars may be able to construct alternate terms calibrated to their particular modeling purposes, in the gritty world of policy and practice such academic concepts cannot entirely replace the operational and normative reality of international law.[9] At an operational level, states explicitly frame their actions in terms of—and energetically jockey over—its content.[10] At a normative one, our universal experience in domestic society is that none of the developments typically associated with liberal human progress—increasing economic activity and material well-being; procedural, non-violent political processes; reasonable community respect for human dignity—are sustainable without a robust and evolving societal "rule of law."[11] International law is, in short, the functional stuff that we have to work with in order to effect a civil and durable international society. It is thus a practically important task to ground it in a reasonably determinable, useful, and predictive theory of world politics.

Until relatively recently, such efforts were condemned to failure. The assumptions respectively underlying the dominant political and legal paradigms of international organization were too incompatible. International lawyers quibbled over the legitimacy and applicability of given legal norms while realist-dominated IR concerned itself with instrumentalist calculations of state interest—a conception of world

8. *See* Kelly, *supra* note 2, at 465–69 (describing the perception defects of CIL giving rise to endemic contestation). The limitations of conventional understandings of international law, based on treaty and custom, are considered in detail below.

9. *See* Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487, 489–95 (1997).

10. Law skeptics dismiss these perambulations as casuistry, which of course, they are. This point affords little critical traction, however, as all social laws rely on casuistry, or the extrapolation of principles to new factual circumstances. *See* RICHARD POSNER, PROBLEMATICS OF LEGAL AND MORAL THEORY 122 (1999) ("The casuistic method has a long history in law and ethics; it dates back to Socrates, has adherents in contemporary philosophy . . . , undergirds the common law system of England and the United States, and is the cornerstone of American law teaching."). Without the capacity to adapt the rules to new realities, any system of law, domestic, international, or otherwise will, fairly rapidly, become obsolete.

11. *Cf.* SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW 33–35 (2003) ("The concept of Rule of Law . . . is fundamental to a free society").

order with little functional room for international law.[12] The increasing sophistication of IR analysis, however, has altered this situation. The institutionalist insight into information and coordination, and the post-rationalist[13] focus on preference formation has reopened a distinct theoretical space for international law. This development has led to an emergent "interdisciplinarity" between the study of international law and IR. It is once again becoming clear that lawyers and IR theorists are talking about the same thing, just using different languages. Several recent articles have adopted this mode of analysis to re-conceptualize international law as a functional component of world politics.[14] To date, however, there has been no systematic effort to test such a functional theory of international law as a general empirical claim.

This paper is intended to redress that lacuna. It articulates, operationalizes,[15] and evaluates a political theory of international law's formation, legitimization, and change. Part I examines the doctrinal problems of contemporary international law from the vantage of H. L. A. Hart's concept of primary and secondary rules. The section concludes with an explanatory theory of international legal continuity and change based on secondary principles grounded in complex strategic interaction. The theory predicts that when one or more key strategic variables change, there will be a consequent evolution in the consistency and/or content of associated international legal rules.[16] Part II articulates the causal components of this theory. It employs the successive insights of realism, institutionalism, and post-rationalism into IR to develop a complex, but reasonably parsimonious model of strategic interaction predicated on three key variables: capabilities, information, and values. Part II also demonstrates that,

12. *See* Keohane, *supra* note 9, at 488–94.

13. The basis and import of the term "post-rationalism" is described in the text *infra* accompanying notes 69–71.

14. *See generally* Karl Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, *in* HANDBOOK OF INTERNATIONAL RELATIONS 538, 538–558 (Walter Carlsnaes, et al. eds., 2002) (surveying compliance in international law and international relations literature); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002) (attempting to reconcile rational choice theory with CIL and responding to Goldsmith and Posner); John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139 (1996) (applying the IR Institutionalist or "Regime theory" notion of iteration to the law of treaties as international legal behavior).

15. By "operationalize," I mean translating a theory into terms that can be evaluated by empirical or qualitative methods.

16. One possible expression for this theory is: Δ (Complex Strategic Environment) $\rightarrow \Delta$ (International Law). The analytical content of these variables is articulated below.

contrary to the "hard realist" claim that international law is irrelevant to world politics,[17] law in fact plays a functionally critical role in the strategic process. Part III articulates the dependent variable, international legal rules. Part IV qualitatively applies this theory in the context of the purported international legal prohibitions on slavery, intervention, and landmines. Finally, Part V assesses the theory in light of the cases and draws doctrinal conclusions.

I. A THEORY OF SECONDARY RULES

Any useful law is a prediction of likely consequences.[18] Societies create social laws to coordinate conduct between actors by predicting standard behaviors, and when and how collective decisions will be made.[19] This function in turn facilitates achievement of society's instrumental and normative ends. Thus, the law is a functionally-fashioned tool directed at achievement of man's common aspirations.

This characterization applies with equal force to the law of the international system. International law consists of the predictive rules and norms that govern the conduct of states and international organizations.[20] As elaborated further below, this law evolves out of recurrent interactions between the system's actors and sustains the various normative rubrics of world politics: order, justice, prosperity, etc.

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17. *E.g.*, CARR, *supra* note 4, at 228–29 (arguing that international law was a function of the international power politics between "[t]he tiny number of states forming the international community" at that time); Goldsmith & Posner, *supra* note 1, at 641 ("In both the traditional and new varieties, CIL as an independent normative force has little if any effect on national behavior."); HANS J. MORGENTHAU, POLITICS AMONG NATIONS 216–19 (1948) ("The difficulty of substituting the unanimous consent of all subjects of international law for genuine international legislation becomes still more acute when states try to conclude general treaties dealing with political matters with binding effect for all or virtually all subjects of international law.").

18. *See* KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS 1 (1979). There certainly are notions of law, and international law in particular, that conceive the law as an end in itself or an immutable code of universal maxims with no necessary connection to practical consequence. While such conceptions may be interesting to the moralist or theologian, they are of little use in understanding, predicting, and channeling political action, which is, I believe, the common ambition of political science and the legal profession.

19. *See generally* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) ("The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.").

20. RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW § 101 (1987) ("International law, as used in this Restatement, consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.") [hereinafter RESTATEMENT 3D]. This concept is sometimes referred to in the legal academy as "public international law."

In his seminal work, *The Concept of Law*, H. L. A. Hart distinguishes between two types of legal rules: "primary" rules that govern social behavior and "secondary" rules that specify ways in which primary rules may be ascertained, eliminated, varied, or adjudicated.[21] In primitive legal societies, secondary rules tend to be poorly articulated. Thus, there is no recognized procedure for resolving disputes regarding the proper content or evolution of the law. This condition results in several problematic effects: the legal process becomes static, uncertain, and inefficient.[22]

These characteristics are precisely descriptive of the ailments afflicting contemporary international law. Article 38 of the Statute of the International Court of Justice articulates the sources generally accepted by international lawyers as the secondary rules of international law: explicit international agreements, or treaties; customary international law (CIL); the general principles of law recognized by civilized nations; and judicial decisions and the teachings of the most highly qualified publicists.[23]

CIL is conventionally understood as the product of consistent state practice and *opinio juris*, or a state's subjective feeling of legal obligation to engage in a certain pattern of behavior.[24] Since CIL is conceptually contingent on the behavior and beliefs of states, it expresses the "naturally-evolving" law of international society. Treaties express law that parties mutually consent to through explicit transactions between them: a type of public international contract. The "general principles of law" are norms that are theoretically common to all national legal systems.[25] The "opinions of publicists" has been construed to include the classic works of the international legal

21. H.L.A. HART, THE CONCEPT OF LAW 89–96 (1961).

22. *See id.* at 90–94.

23. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 3 Bevans 1153, 1187.

24. *See* Michael Akehurst, *Custom as a Source of International Law*, BRIT. Y.B. INT'L L. 1, 31–32 (1974–75); Michael Byers, *Introduction: Power, Obligation, and Customary International Law*, 11 DUKE J. COMP. & INT'L L. 81, 83 (2001); North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 44 (Feb. 20) ("[acts constituting *opinio juris*] must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. . . . The states concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough."); *see also* CLIVE PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW (1965) (discussing the articulation and evolution of CIL).

25. RESTATEMENT 3D, *supra* note 20, § 102 cmt. l. An example might be the law of conspiracy or of an elementary notion of remedy for civil wrongs. Obviously, it is a great deal more difficult to derive norms from this principle in the postmodern, multicultural present than it would have been in pre-decolonization 1948, when the rule was drafted.

canon, such as Grotius and Vattel; the adjudication of contemporary national and international jurists; treatises and writings of authors of standing; resolutions of scholarly bodies such as the Institute of International Law and the International Law Association; and draft texts and reports of the International Law Commission.[26] In practice, the first two categories, CIL and treaties, are typically considered the primary sources of international law.[27] The general principles and publicists' opinions are relied upon as supporting principles which provide context for the primary sources.[28]

While the Article 38 paradigm is an adequate framework for post hoc adjudication of most disputes, it is methodologically flawed as an articulation of the secondary rules of international law. The problem is that it essentially relies on the behavior of states and what states say about their behavior as the basis for predicting change and continuity in the law's primary rules. In other words, it purports to assess and explain the causes of behavior with doctrinal descriptions of the same behavior. Most international legal scholarship thus fails to distinguish between the causal sources of law and what amounts to evidence of that law.[29]

The defects of this tautology can be seen in international law's interminable doctrinal contention. These tensions are particularly pronounced in the context of CIL.[30] Conceptually, there is very little consensus regarding the contents of CIL's constituent elements. State practice is generally taken to include diplomatic and governmental acts interpreted in light of official statements of policy, whether taken unilaterally, or as part of an international organization.[31] Some commentators contend, in contrast, that state practice should be evaluated independently of statements by actors regarding the justification or intent of their actions.[32] By this definition it is quite difficult to

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26. *Id.* § 103 reporters' note 1.

27. *See* John King Gamble, Jr., *The Treaty/Custom Dichotomy*, *in* INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS, *supra* note 2, at 75 ("But academics seldom think seriously about what the two principal sources, treaty and custom, mean, how they relate to each other, and how they have clouded or distorted our view of the field.").

28. *See* RESTATEMENT 3D, *supra* note 20, § 102 reporters' note 7.

29. An analogy in the domestic context would be trying to discern the legal speed limit by observing the speed of cars driven on the road.

30. Commentators frequently refer to these doctrinal tensions as either the paradox or conundrum of CIL. *Cf.* Swaine, *supra* note 14, at 563.

31. *See* RESTATEMENT 3D, *supra* note 20, § 102 cmt. b.

32. *See, e.g.*, ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 34–39 (1971) [hereinafter CONCEPT OF CUSTOM].

identify a place for *opinio juris* at all. The converse option, however, permits states' rationalization of their activities to have a formal law-channeling effect unsubstantiated by political reality.[33] Another problem with CIL identification is that it is not clear how consistently and how long a practice must continue before a legal norm is established or altered.

There are further tensions with the systemic aspects of modern CIL. International law emerged from the nineteenth and early twentieth centuries with a strong positivist character.[34] Legal norms are generally thought to require state acquiescence both for efficacy and legitimacy. This principle is given effect through a doctrine of sovereign self-exemption from emerging rules through specific dissenting acts during CIL norm formation. This "persistent objector" rule, however, is becoming increasingly contested as some publicists and states assert that CIL norms created by a majority consensus are binding upon the entire community.[35] It is also unclear how CIL can change, since any derogation from existing rules is formally illegal.[36]

Treaties and conventions themselves constitute state practice and thus contribute to the development of CIL.[37] In recent decades inter-

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33. *See* Akehurst, *supra* note 24, at 36–37 (arguing that states' statements regarding international law should be considered *opinio juris* without reference to those states' actions or actual beliefs).

34. *See* John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433, 437 & n.6 (1997) (noting the roots of the twentieth century concept of law as arising only from an act of sovereignty—as articulated by the Permanent Court of International Justice in the *Lotus* case—in the writings of nineteenth century postivists—such as John Austin—but also observing that this view "continues to resonate in the understanding of a public unacquainted with the writings of those often characterized as positivists or with the nature of the debates between postivists and others").

35. *See generally* Gennady M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 EUR. J. INT'L L. 42 (1991), *available at* http://www.ejil.org/journal/Vol2/No1/art3.html (last visited November 17, 2003) (discussing at length various publicists' opposition to positivist law in the context of *jus cogens* formation).

36. *See* CONCEPT OF CUSTOM, *supra* note 32, at 4–5. Hart also describes this reality: "The only mode of change in the rules known to such a society will be the slow process of growth, whereby courses of conduct once thought optional become first habitual or usual, and then obligatory, and the converse process of decay, when deviations, once severely dealt with, are first tolerated and then pass unnoticed." HART, *supra* note 21, at 90.

37. *See* Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 29–30 (June 3) ("[M]ultilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."). *But see* R.R. Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 25, 96 (1970) ("The phenomenon of the crowding out of customary international law by treaties to which a substantial number of States have become parties has already been alluded to. The price of success is to limit the scope for the operation of customary law, so that as more and more States become parties it is virtually impossible to say what the law would be in the absence of the treaty. . . . And if little or no customary international practice is gener-

national legal advocates have attempted to overcome some of the indeterminacy associated with CIL by codifying substantive areas through multilateral binding agreements.[38] This initiative, however, has proven to have only moderate efficacy. In most cases, resolution of disputes regarding a treaty's terms must finally be effected by the contesting parties themselves.[39] Further, a treaty's contents are themselves subject to reconstruction through the medium of CIL.[40] Thus, the same tension that characterized discussion of CIL ultimately infects any contested ground in the treaty context as well.

This cumulative doctrinal indeterminacy is exemplified in the recent emergence of *jus cogens*, or purported peremptory norms of international law from which there can be no legal derogation.[41] *Jus cogens* has a solid grounding in the legal literature.[42] There is no consensus, however, as to what constitutes a peremptory norm or how a given norm rises to that level.[43] Conventionally asserted *jus cogens* principles include prohibitions on genocide, slavery, aggressive use of

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ated by the non-parties, it becomes virtually impossible to determine whether the treaty has indeed passed into customary international law.") (footnote omitted).

38. *See, e.g.*, M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 155 n.238 (2001) (lamenting the resistance of states to efforts by publicists to codify international criminal law).

39. There are adjudicative bodies available, but the decision to abide by their rulings remains a sovereign one. The International Court of Justice's decision in the Nicaragua Case, for example, was ignored by the United States. *Discontinuance by Nicaragua in Case Against the United States*, 86 AM. J. INT'L L. 173 (1992) (citing the "longstanding" view by the United States that the I.C.J. was "without jurisdiction to entertain the dispute").

40. *Cf.* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103 (June 27) (recognizing that CIL has defined the substantive contents of the sparse use of force language contained in the UN Charter) [hereinafter *Nicaragua Case*]; RESTATEMENT 3D, *supra* note 20, § 102 cmt. j ("A new rule of customary law will supersede inconsistent obligations created by earlier agreement if the parties so intend and the intention is clearly manifested.").

41. RESTATEMENT 3D, *supra* note 20, § 102 cmt. k. The Vienna Convention on the Law of Treaties defines *jus cogens* as peremptory norms from which there can be no derogation. The norms' relatively recent origin is asserted in articles 53 and 64 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, May 23, 1969, arts. 53, 64, 1155 U.N.T.S. 331, 344, 347 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

42. Article 53 of the Vienna Convention, *supra* note 41, 1155 U.N.T.S. at 344, states:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

In the *Nicaragua Case,* the International Court of Justice suggests *jus cogens* as a fundamental principle of international law. *Nicaragua Case*, 1986 I.C.J. at 100.

43. *See* M. Cherif Bassiouni, *International Crimes, Jus Cogens, and Obligatio Erga Omnes*, LAW & CONTEMP. PROBS., Autumn 1996, at 63, 67.

force, and piracy.[44] Claims have also been made, however, for such principles as a people's permanent sovereignty over wealth and natural resources, the right to development, space and the seabed as the common heritage of mankind, and a people's right to a cultural heritage.[45] Some scholars see *jus cogens* sources and customary international law as the same, others distinguish between them, while still others contend that *jus cogens* is simply another way of describing certain "general principles of law."[46] Thus, the legal rationale for *jus cogens* amounts to a sort of tautology: all states are obligated to abide by *jus cogens* norms because they are universal; and they are universal because all states are expected to abide by them.

Hart's obvious prescription for this legal quagmire is clear distinction of secondary rules. In a well-ordered domestic society, these rules are manifested in the function of legal institutions exercising some combination of executive, legislative, and judicial powers distinct from, and determinative of, the primary rules that define legally acceptable social behavior. The international environment, however, is notoriously resistant to thorough-going institutionalization. States resist such formal articulation of secondary rules precisely because they seek to retain their freedom of action. Thus, any state action is a potential proposal for modification of the existing regime (legislative), a potential enforcement of established law (executive), and a potential judicial determination upholding or applying existing law to facts (judicial). The international community's reaction to a state act has a similar potential for overlap.

Consequently, formalist analysis of international law's secondary rules is unlikely to yield determinable predictive results. It inevitably becomes bogged down in normative contestation and doctrinal ambiguity. The alternate approach taken here is to develop a functional theory of international law's secondary rules.

The theory's basic premise is that international law's primary behavioral rules are the product of a strategic process of norm coordination, recognition, and collective conditioning. The theory predicts that the content of these legal rules (the dependent variable) will become contested when there is a change in the complex strategic environment encountered by international actors (the independent variable). If this change is sufficiently thorough and persistent, the new

44. *See id*. at 68.

45. *See* Danilenko, *supra* note 35, at 42–43, 57–64.

46. *Id*.

rule will ultimately gain community legitimacy and recognition as a new or amended principle of international law. Where such a legal rule is supported by overwhelming sustaining conditions there is some basis to assert it as a *jus cogens* norm.

II. THE STRATEGIC EQUATION

This section articulates this functional theory's three explanatory variables: capabilities, information, and values. The variables are derived from contrasting IR paradigms of how international actors make decisions in the world environment. Rather than trying to resolve whether any one perspective is predictively superior to the others, the model constructed here assumes that they each provide a valuable, distinctive insight into the complex reality of world politics. The resultant theory consequently incorporates an explanatory variable from each.[47] Once in operation, the theory should provide a sufficiently sophisticated—yet reasonably parsimonious—model of world politics to understand the formation, function, and evolution of international law.[48]

A. Capabilities (Independent Variable)

As alluded to before, the realist paradigm is not generally considered amenable to international law. It provides, however, invaluable insights into the structure of the international system and, therefore, the environment within which the law operates. Classical realism conceptualizes the political realm as a struggle for domination.[49] It is a sort of political Nietzscheism: actors are primally (and therefore properly) motivated by the will to acquire and employ power.

Power is itself a theoretically problematic term, sharing in some of the same kind of conceptual ambiguity and imprecise use experienced by international law. "Power can be thought of as the ability of an actor to get others to do something they otherwise would not do

47. One possible expression for this conception of the strategic environment is: (Capabilities •Information •Values) = (Complex Strategic Environment).

48. The claim here is not that the three variables articulated here are the only causal factors in world politics, but that they afford an adequate explanatory basis for the present project. It is certainly conceivable, indeed likely, that a great many more, or more precisely calibrated variables would inform our analysis. This theory is based on these three because there exists a comprehensive literature articulating their general form, they generally comport with Kenneth Waltz's structure (which will serve as the foundational concept), and for the fact that one must pick a finite number of cases or lose all predictive traction.

49. Thinkers in this vein include CARR, *supra* note 4, and MORGENTHAU, *supra* note 17.

(and at an acceptable cost to the actor)."[50] A more general articulation is "power is the ability to do."[51] Such broad definitions, however, conflate a spectrum of discrete issues which must be distinguished for the modeling project: they draw on images based on both resources and perceptions between the actors. The latter image in particular implicates prestige, reputation, and ultimately, an actor's beliefs. In order to increase specificity, contemporary realists often employ the more precise term "capability," by which they mean to focus analysis on quantifiable (and therefore comparable) means of political coercion. Thus, the central explanatory variable in the realist paradigm developed here is the relative capabilities of the actors engaged in any particular interaction.[52]

Capabilities may be manipulated to achieve different systemic effects.[53] In addition to variable distribution, capability itself varies among issue areas as well. Different capability types, in other words, are not perfectly fungible.[54] Thus, some resources or actors that are quite effective in achieving results in a particular strategic situation may be of marginal, or even negative, utility in another.

Kenneth Waltz famously developed this capability focus into an elegant model of international order. His "structural realist" paradigm is characterized by functionally identical, egoistic units (states) interacting under conditions of anarchy.[55] The only structurally significant distinction among these units is an inequitable distribution of capabilities. In order to achieve their goals, states tend to behave in a manner that will maximize their relative capabilities. They must do so, however, in an inter-actor, or strategic, environment, where all the other units are trying to do substantially the same thing and capabilities are finite. Thus, the structure of the international system essen-

50. ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION 11 (1977).

51. O'CONNOR, *supra* note 11, at 194.

52. I do not mean to assert that no realists are concerned with prestige or actor beliefs. Thucydides, Machiavelli, Carr, and Morgenthau (classical realists) were each very interested in such inquiry. *See, e.g.*, CARR, *supra* note 4, at 168–215 (discussing the impact of public opinion and public morals on state behavior). The structural realist paradigm developed here, however, definitely tends to discount such complex variables in favor of the elegance of relative capabilities.

53. Krasner articulates these effects as the ability to dictate the rules of the strategic game (such as who can move first), to dictate the payoffs associated with various possible moves, and to determine who can play the game in the first place. *See* Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336, 340 (1991).

54. *See* KEOHANE & NYE, *supra* note 50, at 11.

55. *See* WALTZ, *supra* note 18, at 79–101 (articulating a structural model of world politics).

tially causes states to become rational actors in a strategic market where capabilities are the imperfectly fungible currency of trade.

The operation of this market converts the classical realists' "war of all against all" into a *modus vivendi*–seeking balance of power. States adapt their egoistic goals into a hierarchy of strategic preferences.[56] They engage in "satisficing" behavior, trying to allocate capabilities and exploit disparities to influence other actors in ways which maximize the achievement of their own strategically contingent preferences. The most capable system actors provide the indispensable fulcrum for this interaction.

Since legal rules depend on some measure of compliance, they must be sustained, or at least acquiesced in, by actors exercising a preponderance of strategic capability. The key prediction of the capability variable is that where there is a change in capability distribution, particularly among the most capable actors, there will be changes in strategic behavior that potentially affects the content of international law.[57]

This paper will operationalize capabilities as a resource-focused variable. In particular, it will focus on such standard realist indices as relative, issue-area relevant economic, military, and political potency. Where there is indication of significant shifts in the preponderance of strategic resources available to major system actors whose strategy potentially run counter to an existing legal norm, we will expect to see change.

B. Information (Independent Variable)

The information variable is based on the insight that what international actors know (or do not know) about their counterparts' capabilities and future behavior is at least equally important to strategic decision as the capabilities themselves. This places information at a

56. *See* Jeffrey A. Frieden, *Actors and Preferences in International Relations*, *in* STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 39, 41–45 (David A. Lake & Robert Powell eds., 1999).

57. Realists predict that capability shifts are the sole substantive determinant of behavior. Thus, norms are incidental by-products of the balance of power and are subject to arbitrary alteration as soon as the capability relationship changes. The frequent failure of this prediction, particularly in regards to coordinative issue areas such as trade and money, is what led to challenges to structural realism from within the discipline of International Relations. *See* ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD OF POLITICAL ECONOMY 7–10 (1984) (describing the predictive failures of realism in the post–World War II era).

high premium. The information variable is principally derived from the institutionalist paradigm.

Institutionalism addresses itself to political interaction that is anomalous to realism, such as international organizations and behavioral norms and it largely adopts structural realist assumptions regarding the operation of the strategic structure. Where structural realism is preoccupied with the distribution of capabilities alone, however, institutionalism focuses on the choices available to states confronting strategic dilemmas. Institutionalism points out that in many scenarios, the most effective strategy is more dependent on the anticipated moves and reactions of other actors than the precise distribution of their capabilities.

A standard illustrative metaphor for conceptualizing this interaction is game theory.[58] Here, bilateral strategic dilemmas are modeled as a choice/payoff matrix. The distribution of payoffs for different moves determines the structure of the game—for example, "chicken," "prisoner's dilemma," and "battle of the sexes." The values assigned to available moves reflect the capabilities of the actors involved, and in some situations may change the structure of the game. Within a general spectrum, however, the anticipated move of a strategic counterpart is more significant than a particular capability value. While states' preferences never exactly coincide, there is almost inevitably some margin of overlap.[59] Each state's "best" move (its value maximizing/rational one) is contingent on its expectation of other states' behavior.[60] Thus, contrary to the antagonistic relationship predicted by realism, rational actors engaged in repeated strategic interactions discover that they can obtain superior results in most situations by

58. For a general discussion of game theory, see JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS (1994). *See also* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999) (applying game theory to CIL—albeit with a decided instrumentalist/realist orientation).

59. In those situations where there is no overlap of interests there is no possibility for coordination, and hence no function for institutions. In reality, however, such situations are exceptionally rare (an example might be the World War II insistence of the Allies on absolute victory *vis-à-vis* the Axis Powers). Even where competing strategic actors are engaged in a "dividing-the-finite-pie" relationship, they will usually benefit from Pareto-maximizing information that permits them to both avoid unwanted conflict but still fully exploit the contested good. *See* THOMAS C. SCHELLING, STRATEGY OF CONFLICT 58–67 (1963) (describing coordination in "zero-sum" situations).

60. *See id.* at 15.

coordinating their actions.[61] Keohane and Nye describe the resulting bargaining behavior as process.[62]

Information about other actors' past, and thus, anticipated future behavior is critical to the strategic process. The international system, however, is characterized by imperfect information—actors cannot perfectly predict other actors' preferences, capabilities, or behavior. As discussed above, a state will attempt to influence the behavior of other actors in order to maximize its own benefits.[63] States often have an incentive to misrepresent the extent of their commitments in order to gain strategic advantage.[64] Thus, the strategic process is characterized by problems of credibility.

Another by-product of strategic interaction in an imperfect informational process is the very real likelihood of sub-optimal outcomes. Since states often misrepresent their commitments and gain advantages from periodic defection, it is quite difficult for strategic partners to consistently reach preference equilibria that are Pareto-efficient.[65] Instead, they frequently settle on consensus points that are defined more by their mutual cognitive appearance than their contribution to utility.[66]

As rational actors engaged in an ongoing strategic game, states have incentives to remedy these market inefficiencies. Consequently, they devise functional apparatuses to facilitate access to strategic information and coordinate their behavior. Sub- and suprastate interests also have incentives to participate in this process by providing information responsive to their own strategic objectives. The resulting Inter-Governmental Organizations (IGOs), Non-Governmental Organizations (NGOs), and associated coordinating rules of behavior shape the strategic process, playing a key information-utility role. Consistent participation in such informational activities consolidates an actor's credibility and increases the availability of strategic information regarding other actors. This predictability considerably reduces the negotiation and uncertainty costs of international politics and facilitates each state's ability to achieve and sustain its social

61. *See id.*; KEOHANE, *supra* note 57, at 52–54, 75–78.

62. KEOHANE & NYE, *supra* note 50, at 20–21 (1977).

63. *See supra* note 55 and accompanying text.

64. *See* SCHELLING, *supra* note 59, at 35–36 (discussing the problem of demonstrating commitment to fulfill threats that are counter to an actor's interest, such as massive retaliation).

65. *See* KEOHANE, *supra* note 57, at 85–98 (discussing the problem of strategic market failure).

66. SCHELLING, *supra* note 59, at 72–73.

preferences.[67] Information-enhancing rules and organizations consequently provide the principal substantive content of international law.

This paper will operationalize information through the formation of NGOs and IGOs as well as the focus of protracted media attention to a particular issue area. Where there is a change in the availability, credibility, or substance of information relating to a particular issue area, we will expect to see a change in the associated law.

C. Strategic Values (Independent Variable)

The capabilities and information variables developed above both rest on essentially rationalist, unitary actor assumptions regarding the nature of the primary system actors, states.[68] Under this rubric, states are theorized with uniform preferences (capability-maximization) and react to strategic situations in cognitively identical ways. In contrast, the strategic values variable attempts to account for the complex reality of world politics. It is grounded in a spectrum of "post-rationalist" studies, which query the identity and cognitive processes of international actors. These studies acknowledge an array of diverse, competing interests, experiences, and elites within political units (Liberalism);[69] the complex interaction of these diverse actors across political units (Complex Interdependence);[70] and the conditioning effect of these interactions on actors' cognition of the strategic environment (Constructivism).[71]

Strategic values are concerned with conditioned perceptions, expectations, and path dependencies that affect the way that decision-makers comprehend the international environment, and thus constrain strategic choice. Observed phenomena associated with strategic values include norm "stickiness," special affinities (or antagonisms) between particular international actors, and peculiar institutional decision processes. Of particular relevance to the inter-

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67. KEOHANE, *supra* note 57, at 97; HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 4–6 (1977) ("The order which men look for in social life is not *any* pattern or regularity in the relations of individuals or groups, but a pattern that leads to a particular result, an arrangement of social life such that it promotes certain goals or values.").

68. Information's acknowledgment of space for nongovernmental actors is an acknowledged qualification for this generalization.

69. *See, e.g.*, Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997).

70. *See, e.g.*, KEOHANE & NYE, *supra* note 50, at 24–37.

71. *See, e.g.*, Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384 (1994).

national legal context is the conditioned reliance on informational rules and institutions to base expectations regarding other actors' default, or appropriate, conduct. Another macro effect of strategic values is to bind the strategic "free market" of anarchy into a more polyarchic structure.

This paper will operationalize strategic values through domestic institutional change and observed social value shifts. Where such path dependencies are relevant to a particular rule change, we will expect to see a change in international law.

III. PRIMARY INTERNATIONAL RULES (DEPENDENT VARIABLE)

The dependent variable is the substantive behavioral rules of international law. As discussed above,[72] Article 38 of the Statute of the International Court of Justice articulates the generally accepted basis for determining the content of international law. That rubric will essentially be adopted here as the basis for identifying observable manifestations of the dependent variable. Thus, evidence of continuity or change in the law will include the following: specific state actions or inaction reflecting state practice; policy statements and state digests reflecting *opinio juris*; patterns of treaty adoption, provisions, and adherence or defection; international and national judicial decisions reflecting general principles of law; and, to a lesser extent, commentary by legal publicists.[73]

IV. THE CASES

This section will apply the theory developed above in the context of three purported rules: the international legal prohibitions on slavery, foreign intervention, and landmines. The cases were selected to evaluate the theory's validity across a reasonably diverse cross-section of substantive international issue areas. The three rules are also representative of three broader international regimes that comprise a significant portion of the total spectrum of world politics. The proscription on slavery is perhaps the original rule of the modern international human rights regime. The prohibition on intervention in the territorial domain and affairs of another state is one of the foundational rules of the sovereignty regime, and therefore of international law. The landmine ban derives from the armed conflict regime. The

72. See *supra* note 23 and accompanying text.

73. A possible expression of this dependent variable is: (International Law) = (state practice + *opinio juris* + treaties + publicists' opinion).

cases are limited to consideration of prohibitionary rules in order to provide some level of standardization and to minimize ambiguity related to affirmative normative duties. The cases are also limited to primary (behavioral) rules to limit causal tautology problems.[74] Together, they comprise a non-exhaustive, comparative basis for assessing the utility of the functional theory of international legal continuity and change developed in this paper.

A. Slavery

Slavery has existed for time immemorial. The practice was common among the Greeks and Romans, and was considered a natural condition by Aristotle.[75] Almost every other world civilization has had a functional equivalent. The contemporary legal prohibition on slavery, however, originated as a function of the early modern era effort to end the transatlantic slave trade.[76] This unambiguously brutal commerce transported millions of African people to the Americas principally to perform agricultural labor. Until the late eighteenth century, this practice generally went unchallenged.[77] Hugo Grotius, for example, wrote in 1646 that slavery was a feature of positive law.[78] The humanist ideas of the European Enlightenment, however, began to change social and political attitudes towards slavery. Protestant Christian revivalism, spurred by the spread of printed gospels to an increasingly literate population, also provided a powerful impetus for abolitionism.[79]

Due to a number of congruent economic, political, and cultural conditions,[80] this ideational revolution was particularly powerful in

74. The non-intervention norm is intimately related to the law of sovereignty and international legal personality. *See* Stephen D. Krasner, *Problematic Sovereignty*, *in* PROBLEMATIC SOVEREIGNTY 1, 5–12 (Stephen D. Krasner ed., 2001) (conceptualizing different aspects of the state sovereignty norm; Krasner's "Westphalian Sovereignty" is equivalent to the concept of non-intervention developed here). This paper, however, will limit itself, to the extent possible, to the prohibition on intervention in another state's physical territory.

75. Anti-Slavery International, *The History of Anti-Slavery International*, *at* http://www.antislavery.org/homepage/antislavery/history.pdf (last visited November 16, 2003).

76. *See id.*

77. *See* Renee Colette Redman, *The League of Nations and the Right to be Free from Enslavement: The First Human Right to be Recognized as Customary International Law*, 70 CHI.-KENT L. REV. 759, 765–68 (1994).

78. *See id.* at 766–67.

79. *See* Anti-Slavery International, *supra* note 75.

80. These included, *inter alia*, Britain's dominant commercial position, lead in the nascent industrial revolution, eclectic mix of potent evangelical religious denominations, and relatively pluralistic political institutions. *See generally* J.R. OLDFIELD, POPULAR POLITICS AND BRITISH

Britain. Slavery was not widely practiced in Britain itself, no doubt largely due to the surplus and political power of free labor. Thus, an abolitionist cultural norm emerged relatively unchecked in Britain itself. Slavery was declared illegal in England in 1772 and in Scotland in 1778, but it persisted in the colonies, where the practice was regarded as economically imperative.[81]

The Quakers were the initial force to actively seek to proscribe the international slave trade. During the 1770s the Society of Friends purged its membership of slave traders and owners.[82] In 1783, Philadelphia and London-based Quaker groups acted in concert to establish the first modern-era international abolitionist organization, the Society for the Abolition of the Slave Trade.[83] This organization and its successors served as a vehicle for the collection and public distribution of extensive first-hand information on conditions relating to the international slave trade.[84]

These organizational efforts bore fruit in 1807 when both the United States and Britain prohibited international slave trafficking.[85] Coincidentally, Britain had just emerged victorious from the Napoleonic wars and now had both the incentive and the preponderant capabilities sufficient to attempt to control the Africa trade.[86] Abolitionism provided a utilitarian vehicle for this hegemonic endeavor. The British began active naval patrols to prevent slaves from leaving Africa and put pressure on other European, African, and American governments to curtail the commerce as well.[87] These efforts achieved some notable formal successes. France proscribed slave trading in 1815.[88] At the Congresses of Paris (1814), Vienna (1815), and Verona (1822), the key powers of Europe jointly pledged to suppress the slave trade.[89]

ANTI-SLAVERY: THE MOBILISATION OF PUBLIC OPINION AGAINST THE SLAVE TRADE 7–33 (1995); A.G. Hopkins, *The "New International Economic Order" in the Nineteenth Century: Britain's First Development Plan for Africa*, *in* FROM SLAVE TRADE TO "LEGITIMATE" COMMERCE: THE COMMERCIAL TRANSITION IN NINETEENTH-CENTURY WEST AFRICA 240–59 (Robin Law ed., 1995) [hereinafter "LEGITIMATE" COMMERCE].

81. *See* Anti-Slavery International, *supra* note 75.

82. *See id.*

83. *See id.*

84. *See* OLDFIELD, *supra* note 80, at 41–64 (discussing the Society for the Abolition of Slavery generally and its London Committee in particular).

85. Redman, *supra* note 77, at 768.

86. *See* Hopkins, *supra* note 80, at 246.

87. *See* Redman, *supra* note 77, at 772.

88. *See id.* at 769.

89. *See id.* at 769–70.

This formal consensus did not translate, however, into a substantive international legal prohibition. The slave-holding planter societies of the Americas and their European patrons continued to comprise a strong international constituency opposed to abolition. In 1825, for example, the U.S. Supreme Court ordered the return of slaves discovered on a captured pirate ship to their original Spanish owners, finding the recent national prohibitions of the slave trade insufficient grounds to change positive international law established by two centuries of uniform slave trading practice.[90] Contemporary British cases were in accord.[91] Thus, British cruisers did not search foreign-flagged vessels and the slave commerce continued apace.[92]

Britain, however, sustained its abolitionist policy. It pressured a significant number of states into bilateral treaties granting mutual rights for each state to search ships flying the other's flag.[93] In 1833, Parliament formally abolished slavery throughout the Empire.[94] In 1841, it initiated a multilateral treaty proclaiming the slave trade an act of piracy.[95] Britain also attempted to cut off the supply of slaves at its source, intervening directly in African societies to depose rulers that persisted in the commerce.[96] Despite these efforts, however, the transatlantic slave trade remained robust until the latter part of the nineteenth century, when the demand for slaves was terminated in the Americas as a result of the American Civil War (and resulting revolutionary domestic institutional change) as well as continuing British pressure on Brazil and Cuba.[97] These events signaled the political and cultural unification of the contemporary world powers around an abolitionist norm.

Subsequent to the cessation of the transatlantic slave trade, abolitionist efforts shifted in focus to the continuing practice of slavery in the Middle East and Africa itself. In 1885, the European powers held a meeting in Berlin to coordinate their African colonial policies.[98]

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90. *See* Antelope, 23 U.S. (10 Wheat.) 66, 90 (1825).

91. *See* Redman, *supra* note 77, at 771.

92. *See id.* at 772.

93. *See id.* at 772–73.

94. *See id.* at 768.

95. Redman, *supra* note 77, at 773; Treaty for the Suppression of the African Slave Trade, Dec. 20, 1841, 92 Consol. T.S. 437 [hereinafter Treaty of London].

96. *See* Kristin Mann, *Owners, Slaves and the Struggle for Labour in the Commercial Transition at Lagos*, *in* "LEGITIMATE" COMMERCE, *supra* note 80, at 144, 145 (citing the British intervention in Lagos in 1851 to depose a holdout to an abolition treaty).

97. *See* Redman, *supra* note 77, at 773–75 n.88–92.

98. *See id.* at 775.

While the central concern of the Berlin Conference was establishing a free trade area in central Africa, the resulting General Act also provided that "[c]onformably to the principles of the law of nations . . . the territories forming the conventional basin of the Congo . . . shall not serve either for a market or way of transit for the trade in slaves of any race whatever."[99] Four years later, the British initiated a similar conference at Brussels with the purpose of ending "the crimes and devastation engendered by the traffic in African slaves."[100] The convention resulting from this meeting provided for economic and military measures to directly intervene in the slave trade within Africa as well as a comprehensive system of maritime search rights for vessels in the area.[101] Indeed, enforcement of the emergent international rule prohibiting slavery served as both rationale and impetus for the extension of European colonial control over Africa.[102]

Following World War I, the Allied powers reaffirmed their commitment to the legal elimination of slavery in the Treaty of St. Germain-en-Laye.[103] In 1922, the League of Nations requested that its member nations report on the status of their efforts to eliminate slavery.[104] Receiving disappointing replies, the League Council established a Temporary Slavery Commission to collect information and make recommendations to facilitate elimination of the practice.[105] The Temporary Slavery Commission's report led to the adoption of the Slavery Convention of 1926 by the League member states.[106] This convention was the first international agreement to define the terms "slavery" and the "slave trade" in international law. According to the Slavery Convention, slavery is the "status or condition of a person

99. General Act of the Conference of Berlin Respecting the Congo, Feb. 26, 1885, art. 9, *reprinted in* 3 AM. J. INT'L L. 7, 13–14 (Supp. 1909).

100. General Act for the Repression of the African Slave Trade, July 2, 1890, pmbl., 27 Stat. 886, 887, 1 Bevans 134, 135 [hereinafter Brussels Act].

101. *See* Redman, *supra* note 77, at 775–76.

102. *See* Robin Law, *Introduction, in* "LEGITIMATE" COMMERCE, *supra* note 80, at 1, 23–25 (discussing the policing of the slave trade and the growth of formal imperialism in Africa); *see also* Redman, *supra* note 77, at 774–76 (noting that the Brussels Act "provided for the establishment of military stations in the interior of Africa to prevent the capture of slaves, to provide for the interception of slave caravans, and to organize expeditions").

103. Convention Revising the General Act of Berlin and the General Act and Declaration of Brussels, Sept. 10, 1919, 49 Stat. 3027, 8 L.N.T.S. 25 (entered into force Apr. 3, 1930) [hereinafter Convention of St. Germain-en-Laye].

104. *See* Redman, *supra* note 77, at 777.

105. *See* Anti-Slavery International, *supra* note 75.

106. International Convention to Suppress Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927) [hereinafter Slavery Convention of 1926].

over whom any or all of the powers attaching to the right of ownership are exercised."[107] Significantly, this definition excludes several "slavery-like" practices, such as forced labor, which several of the original signatories deemed critical to the social stability of traditional societies.[108] The slave trade includes "all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves."[109] The Convention also imposed duties on signatories to "progressively" abolish slavery in all its forms and to prosecute offenders against the convention.[110]

The League Council subsequently established a permanent Advisory Committee of Experts on Slavery to monitor and distribute information on compliance with the Convention.[111] In the succeeding years, the Committee's reports and those reports' linkage to financial assistance and gaining membership in the League itself were a catalyst for the proscription of slavery in most of the remaining practitioner states.[112]

International efforts in regards to slavery both intensified and became more complex after the founding of the United Nations. UN organizations have produced a steady stream of studies, surveys, and reports on slavery.[113] For the duration of the Cold War, both blocs were also incentivized to employ their capabilities to achieve ideologically-appealing abolitionist legal norms.[114] These efforts facilitated the adoption of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery in 1956.[115] Adherence to this treaty,[116] combined with the

107. Slavery Convention of 1926, *supra* note 106, art. 1, 46 Stat. at 2191, 60 L.N.T.S. at 263.

108. Redman, *supra* note 77, at 781.

109. Slavery Convention of 1926, *supra* note 106, art. 1, 46 Stat. at 2191, 60 L.N.T.S. at 263.

110. The abolition requirement was "progressive" due to concern of severe social and economic upheaval in traditional societies if required immediately. *See* Slavery Convention of 1926, *supra* note 107, art. 2, 46 Stat. at 2191, 60 L.N.T.S. at 263.

111. *See* Redman, *supra* note 77, at 784–85.

112. *See id.* at 785–92.

113. *See* A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 VA. J. INT'L L. 303, 329–42 (1999).

114. *See* Anti-Slavery International, *supra* note 75.

115. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 40 (entered into force Apr. 30, 1957) [hereinafter Supplementary Convention of 1956].

historical developments discussed above, a host of concurring international and regional human rights instruments,[117] the universal national legal abolition of slavery,[118] language in significant judicial opinions,[119] and a stream of publicists' endorsements[120] comprise a substantial formal basis for the claim that the prohibition on slavery is a *jus cogens* principle of international law.[121] This rule continues to be vigorously monitored by the successor organizations to the original Committee on the Slave Trade.[122]

Conversely, the very interest, information, and activity associated with this rule have undermined its apparent universality. Human rights interests have attempted to expand the scope of the slavery prohibition to proscribe such "slavery-like" practices as sex trafficking, forced labor, bonded labor, and immigrant domestic workers.[123] As these practices continue to be widely adhered to in many societies, their inclusion under the slavery rubric tends to dilute the rule's clarity.[124] The legal image is further complicated by attempts by critical studies components of the legal academy to import such harms as

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116. According to the Office of the UN High Commissioner for Human Rights, 119 nations have ratified the Supplementary Convention of 1956, as of February 5, 2002. *See* Office of the High Commissioner for Human Rights, *United Nations Treaty Collection: Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, *at* http://www.unhchr.ch/html/menu3/b/treaty4.htm (last visited Nov. 25, 2003).

117. These include Article 4 of the Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., Supp. No. 13, at 73, U.N. Doc. A/810 (1948); Article 8 of the International Covenant on Civil and Political Rights, Dec. 19, 1966, S. EXEC. DOC. E, 95-2, 999 U.N.T.S. 171, 175; Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 224; Article 6 of the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 146, *reprinted in* 9 I.L.M. 99, 103 (1970); and Article 5 of the African (Banjul) Charter on Human and Peoples' Rights, Ministerial Meeting, Organization of African Unity, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58, 60 (1982), *available at* http://www.africa-union.org/home/Welcome.htm (last visited Nov. 21, 2003).

118. Mauritania was the final state to formally proscribe institutional slavery in 1981. *See* Rassam, *supra* note 113, at 322.

119. *See, e.g.*, Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 33–34 (Second Phase) (Judgment of Feb. 5).

120. *See, e.g.*, Bassiouni, *supra* note 38, at 107–08, 112–15; Rassam, *supra* note 113, at 310.

121. Slavery and slave trading are also generally recognized as crimes of universal jurisdiction. *See* Bassiouni, *supra* note 38, at 107–08, 112–15; RESTATEMENT 3D, *supra* note 20, § 702, reporters' note 4.

122. *See* Anti-Slavery International, *supra* note 75.

123. *See id.*; *see also* Rassam, *supra* note 113, at 322–29.

124. These efforts are demonstrative of the casuistry typically employed in any legal analysis. The established principles in the slavery context are extrapolated to similar humanitarian norms. Consequently, the new norms are either legitimized, or the existing one is obfuscated, depending on the outcome of strategic process.

gender discrimination and exclusion from "the legal discourse" into the slavery proscription.[125] Finally, the exposure of the continuing practice of vestigial slavery in Africa and the Middle East,[126] coupled with the apparent incapacity of the international community to impose effective sanctions, suggests that the efficacy of the prohibition on traditional forms of slavery may itself be in jeopardy.[127]

This continuing contestation at the margins, however, does not necessarily undermine the core legal rule or its legitimacy. States generally accept responsibility to at least prevent the kind of chattel slavery defined in the 1926 Convention and take affirmative actions to combat the most egregious violations.[128] Moreover, it is virtually inconceivable that a permissive norm could supplant the slavery proscription barring a catastrophic upheaval in the current international environment. Consequently, the contemporary legal proscription of slavery and the slave trade presents a complex reality typical of international law, but is clearly a legitimate, functioning law nonetheless.

B. Non-Intervention

The modern prohibition on intervention in another state's sovereignty emerged in Europe between the fourteenth and seventeenth centuries).[129] The overlapping affiliations of that period (religion, family, language, territory, etc.) created conditions of virtually continuous civil strife.[130] The early non-intervention norm reflected a

125. Rassam, *supra* note 113, at 345–49.

126. *See id.* at 321–22.

127. The verdict remains out on the availability and efficacy of international sanctions. Political inertia and cultural sensitivity concerns have handicapped the ability of Western states to intervene directly to halt this trade as they might have done in the first half of the twentieth century. It may be, however, that international exposure and opprobrium will ultimately prove sufficient sanctions to enforce the prohibition. If that does prove to be the case, these identified violations would in fact substantiate the efficacy of the rule.

128. *See, e.g.*, Walter H. Kansteiner, III, U.S. Policy Towards Sudan, Testimony Before the House Committee on International Relations (June 5, 2002) (Assistant Secretary of State for African Affairs outlines the need for Sudan to be "a priority in America's foreign policy" to combat slave raiding), *available at* http://www.state.gov/p/af/rls/rm/10925.htm (last visited Dec. 2, 2003).

129. *See, e.g.*, Robert O. Keohane, *Ironies of Sovereignty: The European Union and the United States*, 40 J. COMMON MKT. STUD. 743, 747 (2002); John Boli, *Sovereignty from a World Polity Perspective*, *in* PROBLEMATIC SOVEREIGNTY, *supra* note 74, at 53, 55–56.

130. *See* Boli, *supra* note 129, at 55–56.

common need, recognized in nearly every culture, to assert political order to protect society from anarchy.[131]

Territory was an obvious, reasonably determinable coordination point for this aggregate preference.[132] Jean Bodin formally articulated this principle in 1586, connecting the French monarchy with absolute, indivisible, and perpetual sovereignty over a defined political entity, France.[133] Hugo Grotius also presupposed the foundational need for distinct political units defined by autonomy from external interference.[134] The practical requirement for this principle was dramatically demonstrated by the unbridled catastrophe of the Thirty Years War. The Treaty of Westphalia essentially institutionalized sovereign non-intervention as a European legal rule in order to enable monarchs to curb the internecine conflict of sub-state factions.[135] Thus, non-intervention was the linchpin principle for the sovereign state.

As Europe expanded its political control around the world, the rule traveled with it.[136] Europe did not initially recognize any non-intervention rule in regards to its relations with colonized peoples. The consolidation of nations and race to global empire also severely strained against the rule's constraints. The same incentives which

131. *See, e.g.*, Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOK. J. INT'L L. 417, 420 (2000) (noting the recognition of principles similar to Western notions of state sovereignty in the Chinese, Indian and Burmese cultures).

132. It was not, however, the only conceivable coordination point. Other civilizations adopted different organizational references. In East Asia, for example, civilizational spheres were historically more significant than political/territorial boundaries. *See* Michel Oskenberg, *The Issue of Sovereignty in the Asian Historical Context*, *in* PROBLEMATIC SOVEREIGNTY, *supra* note 74, at 83, 86–92. A conceptually useful game theory analogy for this original, pre-sovereignty position is the "battle of the sexes." This coordination game is based on a hypothetical situation where a husband and wife intend to go away for the weekend. The husband would rather go to the mountains and the wife to the beach, but they both prefer to spend the weekend together. The following table reflects the utility payoffs for each player based upon the other player's move.

	Wife to Mountains	*Wife to Beach*
Husband to Mountains	H = 2; W = 1	H = 0; W = 0
Husband to Beach	H = 0; W = 0	H = 1; W = 2

Under these conditions, it does not make a great deal of qualitative difference to the original actors which coordination point becomes the equilibrium; the important thing is that one be selected, after which all actors are significantly better off. *See generally* Krasner, *supra* note 53 (discussing the effect of power on game payoffs).

133. *See* Boli, *supra* note 129, at 56 (citing JEAN BODIN, SIX LIVRES DE LA REPUBLIQUE I.8–II.5 (1576)).

134. *See* Shen, *supra* note 131, at 420–21 (citing HUGO GROTIUS, THE LAW OF WAR AND PEACE 28–44 (Francis H. Kelsey trans., 1925) (1625)).

135. *See* Shen, *supra* note 131, at 421.

136. Oskenberg, *supra* note 132, at 85–86.

prompted the rule's original emergence, however, applied with equal force in the international context. Additionally, the political and cultural dominance of the European sovereignty norm defined and conditioned emerging non-European national elites, effectively foreclosing other organizational possibilities.[137] Aspiring nations of every stripe envied the rule because it represented the legal possibility of their eventual sovereign autonomy; once established, young states enthusiastically asserted its significance to hedge against the prerogatives of more capable senior actors.[138] Thus, despite vast contrasts of preferred political organization across different cultural, historical, and geographic contexts, the principle of non-intervention became a standard coordination point for the entire international system.

The principle is consequently identified in a vast, diverse multitude of legal texts and instruments. A host of global and regional treaties,[139] a continuous stream of United Nations resolutions,[140] the

137. *Id.* at 86–87. Returning to the "battle of the sexes" analogy, *supra* note 132, once the key European powers had chosen the proverbial mountains (territorial sovereignty) around which to coordinate the non-intervention norm, actors wishing to join the game were almost utility-bound to do the same. The following pay-off matrix reflects the situation confronted by an actor (A) attempting to enter the European-dominated international structure:

	Europeans Maintain Norm	*Europeans Abandon Norm*
A Adapts to Norm	A = 2; E = 3	A = -1; E = -1
A Rejects Norm	A = -2; E = 3	A = 1; E = -1

Rejecting the norm placed incoming players (A) at a decisive disadvantage against other actors willing to play by the European rules. A tentatively useful historical demonstration of this effect is the comparative colonial experiences of China and Japan. China rejected the European sovereignty norm, attempting to treat the Europeans as unruly barbarians, best dealt with through marginal concessions. Consequently, China was incorporated into the international system as a compartmentalized client of westernized imperial states. In contrast, Japan, after a fitful start, rapidly adapted its domestic organizational structure to compatibility with Western territorial sovereignty norms—and consequently had a relatively fine stay in the mountains as a peer of the Western imperial states. *See generally* Oksenberg, *supra* note 132.

138. *See* Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT'L L. 1005, 1009 (1998) ("States jealously treasure the principle of non-intervention and it is the chief envy of aspiring states because it is the legal insurance of their sovereign existence."). In the American experience of evolution from colony to sovereign state, these phenomena are demonstrated by the American Declaration of Independence (1776) and the Monroe Doctrine (1823).

139. *See, e.g.*, Franco-American Treaty of Alliance, Feb. 6, 1778, U.S.-Fr., 8 Stat. 6; Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-Fr., 8 Stat. 12; Convention Concerning the Duties and Rights of States in the Event of Civil Strife, Feb. 20, 1928, art. 1, 46 Stat. 2749, 2750, 134 L.N.T.S. 25, 51; Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. 8, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25; Pact of the League of Arab States, Mar. 22, 1945, art. 8, 70 U.N.T.S. 237, 254; Charter of the Organization of American States, Apr. 30, 1948, art. 18, 119 U.N.T.S. 3, 58; Charter of the Organization of African Unity, May 25, 1963, art. 4, 479 U.N.T.S. 39, 74, *reprinted in* 2 I.L.M. 766, 768 (1963); Final Act of the Conference on Security and Co-

pronouncements of the International Court of Justice and generations of international legal scholars,[141] and the incorporation of non-intervention as a foundational principle of both the League of Nations Covenant[142] and UN Charter[143] have confirmed the rule's formal primacy. In principle, non-intervention reigns as the supreme *jus cogens* norm of international law.

The last century, however, has witnessed a series of strategic adjustments substantially affecting the non-intervention principle. The experience of the two world wars, and in particular of the humanitarian atrocities committed prior to and during them, altered the strategic cultural assumptions of pre–World War Western elites. The non-intervention norm was qualified by an ideological commitment to "never again" allow the emergence of such dangerous and catastrophically inhumane conditions. This shift was pushed in a somewhat different direction during the Cold War as the rival ideological aspirations of the two opposing blocs gave rise to strategic values on both sides that essentially assumed a duty to continuously intervene in the domestic affairs of client and contested states.[144] With the end of the

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operation in Europe, Aug. 1, 1975, 14 I.L.M. 1292; Charter of Paris for a New Europe of the Conference on Security and Co-operation in Europe, Nov. 21, 1990, 30 I.L.M. 190, 196 (1991).

140. Kritsiotis, *supra* note 138, at 1008–09 n.6 and accompanying text. *See, e.g.*, G.A. Res. 2131, U.N. GAOR, 20th Sess., Supp. No. 14, at 11, U.N. Doc. A/6014 (1965) (adopted by 109 votes to zero with an abstention cast by the United Kingdom); *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) (adopted by consensus); *Definition of Aggression*, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974); *Annex to the Declaration of the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, G.A. Res. 36/301, U.N. GAOR, 36th Sess., Supp. No. 31, art. 1, at 79, U.N. Doc. A/36/761 (1982) (adopted by 120 votes to twenty-two with six abstentions).

141. Kritsiotis, *supra* note 138, at 1009 n.7 and accompanying text. *See, e.g.*, Corfu Channel (merits) (U.K. v. Alb.), 1949 I.C.J. 4, 35 (Apr. 9); Nicaragua Case, *supra* note 40, at 108; AUGUSTUS GRANVILLE STAPELTON, INTERVENTION AND NON-INTERVENTION OR THE FOREIGN POLICY OF GREAT BRITAIN FROM 1790 TO 1865 (1866); ELLERY C. STOWELL, INTERVENTION IN INTERNATIONAL LAW (1921); J.E.S. FAWCETT, INTERVENTION IN INTERNATIONAL LAW, 103 RECUEIL DES COURS 342 (1961); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 289 (5th ed. 1998); Dominic McGoldrick, *The Principle of Non-Intervention: Human Rights*, *in* THE UNITED NATIONS AND THE PRINCIPLES OF INTERNATIONAL LAW: ESSAYS IN MEMORY OF MICHAEL AKEHURST 85, 87–94 (Vaughan Lowe & Colin Warbrick eds., 1994).

142. LEAGUE OF NATIONS COVENANT art. 10, *reprinted in* 13 AM. J. INT'L L. 128, 131–32 (Supp. 1919).

143. U.N. CHARTER art. 2, paras. 4, 7, *reprinted in* 39 AM. J. INT'L L. 190, 191 (Supp. 1945).

144. *See* Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 2 (1989). Continuing with the game the-

Cold War, the West possessed an unchecked preponderance of intervention capabilities. Moreover, there was a dramatic increase in the availability and attention given to information regarding international humanitarian crises, partly as a result of increased IGO and NGO activity. These factors, combined with the residual Cold War penchant for benevolent meddling created the strategic conditions for the phenomenon of humanitarian intervention.

The state practice ensuing from these conditions is predictably counter to the non-intervention rule. During the Cold War, interventions were frequent but were almost invariably either covert or at least couched in terms compatible with the non-intervention principle, such as self-defense or invitation. Since 1991, the West, and the United States in particular, has engaged or assisted in a continuous series of significant humanitarian intervention operations.[145] While these actions have to date been either authorized or eventually ratified by the UN Security Council, they nevertheless represent overt, forceful interventions in matters classically understood to be within the exclusive domestic jurisdiction of the sovereign state. Increasingly, these interventions are asserted as being themselves commanded by legal obligation.[146]

In the post–September 11 environment and the run-up to the invasion of Iraq in March 2003, the United States has asserted and dramatically acted on a purported right to preemptive self defense.[147]

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ory analysis, *supra* notes 132 and 137, these strategic cultural changes altered the relevant payoff matrix in the eyes of Western elites, changing the character of the game.

	B Intervenes	*B Maintains Non-intervention*
A Intervenes	A = -1; B = -1	A = 2; B = -2
A Maintains Non-Intervention	A = -2; B = 2	A = 0; B = 0

The World Wars and the Cold War revealed that the sovereign non-intervention "mountains" could be dangerous and unpleasant in the event of adversary defection. In order to avoid the recurrence of such catastrophes, states had to at least occasionally go to the beach (intervene). Thus, the utility structure for non-intervention began to look more like a prisoner's dilemma game. Under these conditions, the likelihood of defection from the rule dramatically increases.

145. Northern Iraq (1991), Somalia (1992–93), Liberia/Sierra Leone (1993), Haiti (1994), Rwanda (1994), Bosnia (1995), Burundi (1996), Albania (1997), East Timor (1999), and Kosovo (1999). *See generally* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS (2002) (discussing evolution of international use of force rules).

146. *See, e.g.*, Julie A. Mertus, *Legitimizing the Use of Force in Kosovo*, 15 ETHICS & INT'L AFF. 133, 140 (2001) (book review).

147. *See generally* WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), *available at* http://www.whitehouse.gov/nsc/nss.pdf (last visited Dec. 2, 2003).

This practice represents a further erosion in the absolute non-intervention principle.

Correspondingly, contemporary legal scholarship tends to acknowledge an increasing contingency in the legal prohibition on intervention.[148] To date, this development has apparently not been formally signified in any international instrument; states remain understandably reticent to formally endorse the weakening of the principal legal guarantee of their existence. Non-intervention thus remains both a functionally and formally significant legal consideration. It is apparent, however, that the legal rule is no longer absolutely prohibitory but rather constitutes a sort of jurisprudential balancing of political, normative, and cultural considerations.[149]

C. Landmines

In comparison to the long-evolving proscriptions on intervention and slavery, the purported legal prohibition of landmines is a very recent phenomenon. Landmines were first widely used during World War I.[150] Their conventional purpose was to deny or impede movement of enemy military forces through mined areas. Through most of the twentieth century they were regulated only by the customary principles associated with the law of war: necessity and proportionality to the military objective.[151] The proliferating use of mines during the wars of liberation of the 1960s and 1970s, however, combined with the concomitant (often deliberate) economic and human harm to civilian populations inflicted by the weapons, prompted a movement to formalize these legal limitations.[152]

This effort was incorporated into the 1980 Convention on Conventional Weapons (CCW).[153] The CCW purported to proscribe the

148. *See, e.g.*, FRANCK, *supra* note 145, at 172–73; Kritsiotis, *supra* note 138, at 1047–48. For response, see Shen, *supra* note 131, at 429–30.

149. An analogy from United States constitutional jurisprudence is standard of review. In the past, intervention was only legally permissible under specified legal conditions akin to "strict scrutiny;" today, intervention is considered under the more permissive "rational basis" test.

150. *See* Howard S. Levie, *Landmines: a Deadly Legacy: By the Arms Project of Human Rights Watch/Physicians for Human Rights*, 88 AM. J. INT'L. L. 565, 565 (1994) (book review).

151. *See* Jodi Preusser Mustoe, Note, *The 1997 Treaty to Ban the Use of Landmines: Was President Clinton's Refusal to Become a Signatory Warranted?*, 27 GA. J. INT'L & COMP. L. 541, 548 (1999).

152. *See id.* at 546–48.

153. Protocol II of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW Protocol II]. For further discussion of CCW Protocol II, dealing with antipersonnel devices and booby-traps, see Yvette

use of mines in civilian areas except under specified conditions and also required recording or self-destruct features for all emplaced mines.[154] The efficacy of the CCW was severely impaired, however, by its lack of enforcement mechanisms and the fact that it did not even formally apply to internal conflicts, where much of the harm from landmines was (and is) being sustained.[155] The CCW also mustered poor state adherence.[156] The Soviets relied heavily on mines in their suppression campaigns in Afghanistan, and U.S. planners increasingly incorporated improved mine systems into their doctrine for anticipated battles in Korea and Europe.[157] Indeed, the rate of emplacement of landmines actually increased subsequent to the CCW's adoption.[158] Thus, the CCW's independent normative and legal force is arguably virtually nil.[159]

The end of the Cold War, however, radically changed the applicable global environment. With the fall of the Berlin Wall in 1989, and particularly after the collapse of the Soviet Union in 1991, the geo-security concerns that had previously trumped all other policy and international interests had to contend with an increasingly assertive and resonant human rights agenda. This phenomenon was particularly true in the modern secular democracies which entirely dominated the international stage of the 1990s.[160]

This strategic cultural shift was reflected in the land mine issue area by the establishment of the International Campaign to Ban Landmines (the Campaign) by U.S. and German humanitarian NGOs in 1991.[161] This coalition orchestrated an ambitious effort to reshape international norms through a network of political operatives, social activists, like-minded governments, and in several instances, prominent sympathetic individuals.[162] The Campaign's speed and ability to bypass conventional international law-making channels were remark-

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Politis, Note, *The Regulation of an Invisible Enemy: The International Community's Response to Landmine Proliferation*, 22 B.C. INT'L & COMP. L. REV. 465, 472–73 (1999).

154. CCW Protocol II, *supra* note 153, arts. 4, 5, 1342 U.N.T.S. at 169.

155. Politis, *supra* note 153, at 473.

156. Only forty-one states had ratified the CCW as of 1999. *See* Mustoe, *supra* note 151, at 548.

157. Indeed, the United States did not ratify the treaty until 1995 so that it could participate in the next round of mine treaty negotiations. *See id.*

158. *See id.* at 549.

159. *See id.*

160. *See generally* FRANCK, *supra* note 145.

161. *See* Robert O. Muller, *New Partnerships for a New World Order: NGOs, State Actors, and International Law in the Post–Cold War World*, 27 HOFSTRA L. REV. 21, 21 (1998).

162. *See id.* at 22–23.

able. Notwithstanding this agility, however, the Campaign's methods were remarkably akin to the pioneering international advocacy of the early anti-slavery societies.[163]

In 1992, U.S. Senator Patrick Leahy (D-VT) initiated a moratorium on the U.S. export of antipersonnel mines that has subsequently become U.S. government policy.[164] Two years later, campaign activists persuaded President Clinton to commit to a global ban on landmines in a prominent speech to the United Nations.[165] This combination of advocacy and political commitment resulted in a formal conference to reassess the CCW in 1995. The consequent revisions addressed several of the technical defects of the original convention: they extended the regulations to intrastate conflict, assigned responsibility for removal of emplaced mines, and required the state to enact national proscriptions to sanction individual violators.[166] Largely due to continuing military reliance on landmines by such major powers as Russia and China, and the resistance of other states such as India and Pakistan, these revisions stopped well short, however, of declaring an outright ban on the weapons.[167]

This "failure" was a bitter disappointment to the Campaign's chief proponents.[168] Once it had become clear that the CCW revision conference was not going to enact a prohibition, the Canadian government declared its intention to bypass subsequent UN treaty process and host a meeting of like-minded states in 1997 to negotiate a total ban on mines.[169] The Campaign supported this announcement with a saturation advocacy effort including prominent visits to landmine victims by Diana, Princess of Wales, and public correspondence by retired U.S. military officers.[170] The United States temporarily participated in the negotiation process for this treaty but was unable to secure reservations for advanced technology mines and the Korean

163. *Compare id., with* Anti-Slavery International, *supra* note 75, for illustration of these methods.

164. *See* Muller, *supra* note 161, at 23; *see also* Patrick Leahy, *Major Issues: Landmines*, *at* http://leahy.senate.gov/issues/landmines/lm-facts.html (last visited Dec. 3, 2003).

165. *See* Muller, *supra* note 161, at 23.

166. *See generally* Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) as Amended, May 3, 1996, 35 I.L.M. 1206 (1996) (amending CCW Protocol II).

167. *See* Politis, *supra* note 153, at 479–80.

168. *See* Mustoe, *supra* note 151, at 549.

169. *See* Muller, *supra* note 161, at 24–25.

170. *See id.* at 24–25.

peninsula which it considered vital to its military doctrine. Consequently, it withdrew without signing.[171]

The resultant Ottawa Convention, which entered into effect in 1999, commits all state parties to "never under any circumstances" use any antipersonnel mines, or to develop, produce, stockpile, purchase or transfer antipersonnel mines.[172] The agreement further requires destruction of all existing weapons. The treaty also imposes extensive reporting requirements regarding progress towards elimination of landmines on its adherents.[173] The agreement has elicited an impressive level of international support, with 139 states parties as of October 1, 2003.[174]

The customary force of the landmine ban, however, is minimal. The treaty itself fails to mobilize tangible capabilities to actually disarm or destroy existing mines.[175] This is a particular problem, as the countries most afflicted by mines are invariably also those that have the least resources to remove them.[176] Thus, the parties are themselves unlikely to fully comply with the timelines established in the treaty.

More significantly, the states that have not signed the treaty include the most militarily active and landmine-reliant countries in the world.[177] Millions of new mines are purportedly laid each year.[178] Moreover, these states' militaries continue to develop more versatile mine weapon systems that would be proscribed were they to sign the Ottawa Convention. Consequently, it appears likely that these states will continue to regularly use these weapons into the foreseeable future.

A less quantifiable, but nonetheless significant barrier to compliance in the U.S. context is a cultural hostility to NGO-sponsored law,

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171. Politis, *supra* note 153, at 484.

172. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, art. 1, 36 I.L.M. 1507 [hereinafter Ottawa Convention].

173. *See* Ottawa Convention, *supra* note 172, art. 7, 36 I.L.M. at 1512.

174. *See* Arms Control Association, *Fact Sheets: The Ottawa Convention: Signatories and States-Parties*, *at* http://armscontrol.org/factsheets/ottawasigs.asp (last visited Nov. 21, 2003).

175. *See* Politis, *supra* note 153, at 488–89.

176. *See id.*

177. *See id.* at 486.

178. Michael Polkinghorne & James Cockayne, *Dealing with the Risks and Responsibilities of Landmines and Their Clearance*, 25 FORDHAM INT'L L.J. 1187, 1189 (2002). This statistic dates from 1996. A review of the Internet elicits a range of figures with the number 2.5 million from most electronic sources, but there is no substantiation for this claim.

and the Ottawa Convention in particular, that has developed in the country's military and foreign policy instruments at least in part due to frustration with that treaty's unorthodox, accelerated ratification process.[179] This tendency was exacerbated by the replacement of the Clinton administration with the Bush administration, which, as discussed above, is generally reluctant to promote international legal constraints.[180] Thus, the single state that could most contribute the capabilities necessary to effect compliance with the prohibition is also perhaps least likely to sign it without substantial change in its own current strategic values.

The lack of a customary legal basis for the landmine ban is also reflected in the legal literature.[181] Consequently, notwithstanding the Campaign's tremendous efforts and impressive results, the Ottawa Convention's ban on landmines is legally binding only in regards to parties to that treaty. In regards to the rest of the international community it is a contested norm. It is conceivable that, with the adoption of the treaty by additional powerful states, it may well gain more generally-applicable legal status in the future.[182] It is also quite possible, however, that the dominant actors in the issue area will continue to view landmines as vital components of their military capabilities and prefer a CCW-type regulatory scheme. Without some change in the relative balance of relevant capabilities, it is unlikely that the Campaign will be able to compel coordination around their preferred legal prohibition.

V. ASSESSMENT AND CONCLUSION

The cases lend tentative support to the strategically contingent theory of international law developed in this paper. In the slavery case, a norm that emerged early in the dominant international actor remained contested during a long strategic process of shifting capabilities and existing path dependencies which were strongly permissive of slavery. Once these components were decisively arrayed behind the rule, the operation of the informational functions of the League of Nations and UN provided the mechanism for international legitimization of the rule. More recent attempts to broaden the prohibition to include "slavery-like" practices, however, have run afoul

179. *Cf.* Donna Marie Verchio, *Just Say No! The SIrUS Project: Well Intentioned, but Unnecessary and Superfluous*, 51 A.F. L. REV. 183, 224–25 (2001).

180. *See supra* note 6 and accompanying text.

181. *See, e.g.*, Polkinghorne & Cockayne, *supra* note 178, at 1189.

182. *But see* Baxter, *supra* note 37.

of persisting cultural realities and do not, as of yet, command sufficient adherence to be considered part of the content of the legal rule.

In contrast, the strategic trends that consolidated the international abolition of slavery have tended to undermine the legal prohibition on intervention. As the most capable international actors' strategic values have become increasingly responsive to readily available information on humanitarian catastrophes or nascent security risks, international law has correspondingly become less tolerant of the sovereign idiosyncrasies permitted by the non-intervention rule.

In the case of landmines, similar strategic cultural and informational developments have prompted a substantial effort to effect an international legal prohibition of the weapons. This initiative, however, is unsupported by the actors with the preponderance of relevant strategic capabilities and, consequently, lacks legal force. Thus, there does appear to be, as predicted, a causal relationship between complex strategic variables and legal continuity or change. The empirical endorsement of the particular theory developed in this note remains tentative, however, because these results could conceivably be explained by different independent variables. In other words, while strategic conditions, broadly defined as the international inter-actoral environment, almost certainly have a causal relationship with international law, it may well be that different or more precisely calibrated independent variables—for example, domestic government type, NGO density, information technology, etc.—would yield more accurate empirical predictions. There are also methodological problems with extrapolating the evaluative results from the reasonably determinable prohibitory rules considered here to the general field of international law, particularly its formal secondary rules—such as sovereign equality.

The complex strategic contingency of international law articulated above nevertheless has significant doctrinal implications for both IR and international legal practitioners. The theory directly undermines the hard formalist claims espoused by some legal commentators. Correspondingly, it rebuts the conception of *jus cogens* as perpetually nonderogable, metaphysically universal norms. *Jus cogens* may remain an analytically useful concept to denote a class of particularly strong, or constitutive, legal principles—such rules, however, are subject to the same process of strategic renegotiation and content evolution that characterizes the rest of international law.

The theory also emphasizes the enduring relevance of international law as a significant, facilitative component of world politics. In-

ternational actors are strategically affected, and consequently do—and should—care about the default coordinative behaviors institutionalized by legal rules.

Finally, the theory and cases offer a tentative prediction regarding the direction of future development of international law: toward the aggregate preferences of the most capable and informationally-engaged societies.[183] In the contemporary world environment, this dominant consensus is the secular humanitarianism of modern Western culture. Consequently, future international legal evolution will likely continue to erode the exclusive prerogatives of the state in favor of various human dignity norms.

Methodologically, these conditions point to a need for greater attention to systemic international conditions in the study and practice of international law. Future legal research programs of greater analytical precision will tend to improve our understanding of continuity and change in international law and correspondingly reduce some of the indeterminacy and rule skepticism currently associated with the discipline.

Randall H. Cook

183. While this trend may seem intuitively self-evident, it is significant that it is not predicted by the conventional doctrinal conception of international law formation.