PERSISTENT OBJECTORS, COOPERATION, AND THE UTILITY OF CUSTOMARY INTERNATIONAL LAW

JOEL P. TRACHTMAN*

INTRODUCTION

As pointed out by Professors Bradley and Gulati,[1] the International Law Association's ("ILA") 2000 study on customary international law ("CIL") presents the conventional wisdom regarding the persistent objector rule:

> There is fairly widespread agreement that, even if there is a persistent objector rule in international law, it applies only when the customary rule is in the process of emerging. It does not, therefore, benefit States which came into existence only after the rule matured, or which became involved in the activity in question only at a later stage. Still less can it be invoked by those who existed at the time and were already engaged in the activity which is the subject of the rule, but failed to object at that stage. In other words, there is no 'subsequent objector' rule.[2]

The ILA study points out that the persistent objector rule applies only during formation of the rule. This view is what Bradley and Gulati refer to as the "Mandatory View:" that is, after a CIL rule is formed, it is impossible to unilaterally opt-out of it.

For those who tend to see international law as analogous to contract law, it seems strange to criticize the Mandatory View. What would be left without it? Would CIL only address coordination problems and not cooperation problems? Or would there be some mechanism for discriminating between CIL rules (discriminating design), allowing some rules to be subject to the Mandatory View, while others are subject to the

* Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University.

1. Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 205 (2010).

2. INT'L LAW ASS'N, COMM. ON THE FORMATION OF CUSTOMARY (GEN.) INT'L LAW, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 27 (2000).

"Default View" (defined by Bradley and Gulati as allowing subsequent withdrawal from CIL rules)?[3] Bradley and Gulati concede that the default rule cannot work with an important class of cooperation problems and therefore accept that discriminating design is necessary. However, they fail to explain how an informal mechanism like custom could be structured to include a way to discriminate between cases where the Mandatory View would apply and those where the Default View would apply. I see this as a fundamental flaw in their proposal.

Perhaps the better way to understand Bradley and Gulati's work is not as a proposal for doctrinal change, but as a recognition of the malleable character and limits of CIL. The malleable character results from the fact that CIL is always in a zen-like process of becoming and un-becoming. Hence, the error of the conventional persistent objector rule might be in seeking artificially to distinguish between a period of formation and a period of application. A more socially rooted perspective might understand CIL as constantly being in a period of formation, until it is in a period of disintegration. The limits of CIL in this context arise from the very fact that it is always open to states to commence the process of disintegration of a rule. Moreover, from a legal realist perspective, CIL already can be understood to conform to the Default View perspective, because the remedies for violation often seem insufficient to induce compliance. However, a move to formalize the Default View might upset the existing equilibrium of incentives for compliance.

From a consensus doctrinal standpoint, as opposed to this legal realist perspective, there is not today a "subsequent objector rule." Instead, a different principle is applicable after formation. Consider, for example, the change from an absolute theory of sovereign immunity to a restrictive theory (the latter is a more permissive rule, allowing states to disallow sovereign immunity in more situations). Call this principle the "revision rule." It is by no means a "subsequent objector" rule, but it denotes a process that a subsequent objector may begin.

Thus, although CIL rules may arise despite the existence of a persistent objector, they may only be revised (downward to be less restrictive) based on a practice of violation, including *opinio juris*. There is a "ratcheting up" aspect to this structure, which some idealists might find attractive, and "sovereigntists" may find unattractive. Furthermore, in theory, a state may be a persistent objector to revision, but this would make revision practically impossible if it prevents the application of a less restrictive rule to those wishing to move toward the less restrictive rule.

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3. Bradley & Gulati, *supra* note 1, at 206.

Bradley and Gulati highlight the comparison between the structure for entry into and exit from CIL, and the default structure for entry into and exit from a treaty. It is worth pointing out that the default structure for a treaty is similar to that for CIL: the Vienna Convention on the Law of Treaties ("Vienna Convention") provides for termination of a treaty only in accordance with that treaty's terms (or with the consent of all parties), and for withdrawal only if a right of withdrawal was intended or is implied.[4] To be clear, where a treaty contains no provision allowing for withdrawal or termination, under the Vienna Convention, withdrawal or termination are only allowed if the parties intended to provide implicit permission for withdrawal or termination.

In any event, unless there is a coordinated movement to establish a new, revised rule-based practice, such a practice must begin with a single state's determination and action, in violation of the prior rule. Even if there is a coordinated moment of establishment, the issue remains whether there will be a coordinated *opinio juris* at that moment, completing the status of the new practice as customary law. This is one of the quirks of CIL: a violation may change the law, depending on subsequent action by others. Its character as a violation is clear unless there is a coordinated simultaneous change, but its status as the beginning of a new rule is otherwise unknown until subsequent actions unfold. Hence, although the revision rule is no subsequent objector rule, it allows subsequent objectors to commence a process of contingent revision. I refer to this process as "contingent" revision because definitive revision only ensues if others follow the practice along with *opinio juris*.

In their discussion of "reliance," Bradley and Gulati concede that their "Default View" would not be conducive to resolution of certain types of cooperation problems.[5] They suggest that CIL might not be a useful instrument to solve these types of problems in any event. In order to pursue this thought, I evaluate the relative utility of custom and treaties in addressing international public goods cooperation problems.

I. INTERNATIONAL PUBLIC GOODS COOPERATION PROBLEMS

One example of a public good is the reduction of carbon emissions; that is, consumption of the benefits of carbon reduction is (i) non-excludible, and (ii) non-rivalrous. Because carbon reduction is a public good, without intervention it is likely to be under-supplied. Establishing an

4. *See* Vienna Convention on the Law of Treaties art. 42, 54, 56, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

5. Bradley & Mitu, *supra* note 1, at 254-58.

international legal rule that will cause an efficient level of carbon reduction is an international public goods cooperation problem. Assume that a group of *n* states is considering adopting a customary rule of reduction of carbon emissions by a specified percentage.[6]

For simplicity's sake, assume full compliance with the applicable CIL, consistent with the requirements of conventional doctrine. While obviously counterfactual in a number of real-world contexts, this assumption provides a model for a two-stage game in which states are assumed capable of making binding commitments and allows us to draw insights from that model.

The stages that are to be analyzed include (i) adherence, and (ii) compliance. Under this two-stage game, adapted from Barrett's model,[7] the players choose in stage 1 whether to accept the customary rule or to take persistent objector status.[8] In stage 2, adherents and persistent objectors choose whether to comply or to violate. This decision must be in accordance with the assumption, expressed above, that for any state that has adhered to the rule there is no choice as to whether to comply, provided that there are other adherents who are in a position to enforce the initial adherent's obligations. This model also assumes that any CIL rule is binding, that each player knows what happened at the prior stage, and that each player examines its choices at each subsequent stage when determining what to do at the first stage—whether to accept the CIL rule or take persistent objector status. By this process of backwards induction, we can determine whether states would adhere to the rule or take persistent objector status.

For simplicity, I begin with a two-person prisoner's dilemma game. I use the prisoner's dilemma here because it represents a context in which

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6. I recognize that the application of CIL to international public goods cooperation problems seems strange. I use this example to highlight the incongruity of CIL with the most pressing modern problems of international cooperation. However, it is at least theoretically possible that the outcome of the recent climate change negotiations in Copenhagen would serve as a non-legal kernel (or selected equilibrium) around which a CIL rule could develop. Furthermore, note that the International Court of Justice has recently identified a customary international law rule requiring environmental impact analysis, so this example is perhaps not so very far-fetched. Case Concerning Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 1 (Apr. 20), *available at* http://www.icj-cij.org/docket/files/135/15877.pdf.

7. *See generally* SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING (2003) (discussing Barrett's two-stage model for state action regarding CIL).

8. *Id.* Of course, under CIL, adherence would often take the form of compliance. This does not affect the approach, assuming that *future* compliance has a sufficiently large value to overcome the incentives to simply take advantage of the first state's initial compliance. States can also signal adherence through statements or other behavior short of actual compliance.

cooperation is tough to achieve. Here, the parties have incentives to defect. In other payoff structures, illustrated by games like the battle of the sexes or stag hunt, the parties do not have similar incentives to defect.

The following analysis is adapted from Black, Levi and de Meza.[9] Assume that the payoff to each state for compliance with the hypothetical carbon reduction rule is *rb-c*, where *r* is the number of states that comply, *b* is the benefit produced by each complying state's compliance, and *c* is the cost to each complying state of compliance. In this payoff structure, the aggregate benefits rise in proportion to the number of states that comply. The payoff to a non-complying state simply equals *rb*: under the public good assumption, they get the benefit of compliance by others without the cost of their own compliance. Assume that *b* is less than *c*. Otherwise, there would be no need for a rule of international law: each state would by definition benefit from its own compliance in an amount greater than the cost of compliance. For example, with two players that both comply, and assuming *c*=3 and *b*=2, the payoff to each state from compliance is 1, because 2(2)-3=1. If neither state complies, then the payoff to each is 0. If one complies while the other violates, the complying state player gets a payoff of -1, while the non-complying state gets a payoff of 2. This is a prisoner's dilemma.

Now assume that states may agree to comply through adherence to a rule of CIL. Recall that we are assuming that the rule of CIL is strictly binding, so that it always results in compliance. Because this example has the structure of a prisoner's dilemma, a non-adherent will play the strategy "violate" at stage 2; this is the dominant solution for a non-adherent. In this two-player game, assume that one state adheres to the rule in stage 1. Since that state is the only adherent, assume that the rule either never comes into being or cannot be enforced against it, and so it plays violate in stage 2, as it anticipates that the other state will also play violate in stage 2; it understands the other state's dominant solution, and in fact is acting out its own dominant solution. The outcome is that both play violate: the same type of inefficient equilibrium that we expect in a prisoner's dilemma. Here, however, there is a difference. There is an institutional mechanism for binding rules of CIL. States may move from a non-cooperative game to a cooperative game, with different payoffs and different outcomes.

Anticipating the inefficient solution to the prisoner's dilemma game, both parties examine their choices at stage 1. If one of the parties (*A*) adheres to the CIL rule at stage 1, the other party (*B*) faces the following

9. *See generally* Jane Black, Maurice D. Levi & David de Meza, *Creating a Good Atmosphere: Minimum Participation for Tackling the 'Greenhouse Effect',* 60 ECONOMICA 281 (1993).

choice. If *B* declines to adhere, then *A* will play violate in stage 2, as discussed in the prior paragraph. *B* anticipates that it will receive a payoff of 0 if both parties violate. On the other hand, if *B* adheres, irrevocably binding itself to comply, *A* will be induced to comply, securing a payoff of 1 for *B* (as well as for *A*). So, in this setting, *B* will adhere. We might understand *A*'s adherence as an offer to contract, which *B* may accept by adherence. Adherence is a (weakly) dominant solution for both players in stage 1.

As suggested by Barrett, this model works well for a two-person game, and the two-person prisoner's dilemma when transformed into a cooperative game (in which binding agreement is possible) is easily resolved. This result is intuitive and certainly correct. In part, this two-player case is simple. Where only one player adheres, it receives no benefit, but only a detriment. So it is perfectly willing to revert to the Nash solution: non-compliance. A Nash equilibrium is a set of strategies in which each player plays a strategy that maximizes its payoffs regardless of the actions of other players.

But we are interested in plurilateral and multilateral customary international law. When this two-person model is extended to multiple persons, whether states will adhere to a multilateral custom will depend on the structure of the payoffs. In a game with *n* players, it may well be that a benefit is created through adherence by a coalition that is less than *n*. So reversion to Nash non-compliance may not be attractive to that smaller group. Second, depending on the nature of the required performance, and in particular on whether the benefit of compliance is a public good, as we have assumed, failure to comply or to exclude non-compliant states from the benefit may not be possible.

Using the same formula provided above, we recall that the payoff to a complying state is rb-c, while the payoff to a non-complying state simply equals rb. Recall that r is the number of states that comply, b is the benefit produced by each complying state's compliance, and c is the cost to each complying state of compliance. We assume that the payoff from non-compliance, assuming all others fail to comply, is 0. Therefore, k states will comply if kb-$c \geq 0$. Therefore, if the number of states $k \geq c/b$, then these states will comply. Using the values of c =3 and b =2, if the number of states is greater than or equal to 1.5, they will comply. So, in this example, two states result (as stated above) in a payoff of 1, and since 1>0, they will comply. However, once the number of signatories reaches this level, other states will have no incentive to adhere—they will have an incentive to free ride. Adherence will result in costs incurred by the marginal adherents without affecting the behavior of other states.

The matrix in Table 1 below depicts this circumstance of a Prisoner's Dilemma involving 5 states.[10] For every state that complies, a pure public good is produced, giving all states a benefit of 2, with a cost to the complying state alone of 3. Each state can play either of two strategies: compliance or non-compliance. The dominant strategy is for each state to free ride and play non-compliance, because each of the payoffs for non-compliance in the top row is greater than the payoff for compliance in the bottom row. The Nash equilibrium is an outcome where no state complies.

Table 1: A Public Goods Game

	Number of states that comply					
	0	1	2	3	4	5
Payoff for Non-compliance	0	0	4	6	8	10
Payoff for Compliance	0	-1	1	3	5	7
Aggregate Public Good	0	7	14	21	28	35

However, in our two-stage game with the possibility of adherence to a binding rule of CIL, two states will be expected to adhere under these assumptions—that is, in equilibrium, the number of adherents is 2. This is because the payoff to non-adherents is greater than the payoff to adherents once two have adhered. For example, if 3 states adhere, the payoff is 3 to each adherent but 6 to each non-adherent (non-adherents do not bear the cost).

Barrett shows that under these assumptions the gains from cooperation increase with *b* (the number of states), and decrease with *c* (the cost of compliance). This result is intuitive. However, less intuitive is the fact that the equilibrium number of state adherents increases with *c*, and decreases with *b*. This means that the equilibrium number of states will tend to be small when the gain from cooperation is large, and large when the gain from cooperation is small. Furthermore, in equilibrium, non-adherents can free ride and get a higher payoff than adherents. Of course, this assumes an isolated adherence game, without the ability to subject states to scrutiny or

10. The table is adapted from Todd Sandler, *Treaties: Strategic Considerations*, 2008 ILL. L. REV. 155 (2005), *available at* http://ssrn.com/abstract=1000166.

punishment for "unilateralism," that is, failure to join a plurilateral regime. Much depends on the values of the costs and benefits to each state.

The core problem is one of free-riding: some states may realize the benefit of compliance by others, without incurring any costs themselves. Indeed, each incremental state would prefer to free ride, if it could ensure that enough other states would adhere. This behavior assumes that there is a public goods aspect to the cooperation problem. If, on the other hand, states that fail to comply can be excluded from sharing the benefits, the strategic challenge becomes smaller, although not trivial.

To be clear, if states can be excluded from benefiting from the cooperation of others, all states should then be willing to adhere. By adhering they achieve a greater payoff than they would receive by failing to adhere. Even if the cooperation problem is characterized by a public-goods-type set of payoffs, a relatively easy solution may exist, given the assumption of binding international law. Under the public goods payoffs, assuming binding CIL, the decision to adhere to the (binding) CIL rule, or to preserve persistent objector status, would have the characteristics of a "chicken" game,[11] as described in Table 2 below. I provide a bilateral illustration for simplicity, but this illustration is readily generalized to multiple player circumstances.

Table 2: A Chicken Game[12]

		B	
		Adhere	Object
A	Adhere	*3,3*	*2,4*
	Object	*4,2*	*0,0*

Under these payoffs, each state's best outcome is to abstain from agreement while others form a stable coalition that will generate the relevant public good. The second-best outcome is to adhere while others adhere. The worst outcome is if no state adheres. In this "chicken" game, neither player has a dominant strategy. In this particular case, there is no

11. *See* Ulrich J. Wagner, *The Design of Stable International Environmental Agreements: Economic Thoery and Political Economy*, 15 J. OF ECON. SURV. 377 (2001), *available at* http://onlinelibrary.wiley.com/doi/10.1111/1467-6419.00143/abstract.

12. The table is adapted from STEVEN J. BRAMS & D. MARC KILGOUR, GAME THEORY AND NATIONAL SECURITY 41 (1988).

unique efficient equilibrium. Each player has two Nash equilibria: object when the other adheres, and adhere when the other objects.

However, both players wish to avoid the circumstance where they each play "object," and the even split in the northwest quadrant of the table seems intuitively attractive, although it is unstable. In order to achieve that even split, they should each commit to adhere. They may do so through a number of mechanisms. The simplest, in the treaty context, is a signing conference where each state signs a treaty simultaneously.[13] Only slightly more complex is a specification of a minimum number of adherents prior to entry into force. In the CIL context, commitment to adhere may be possible through the requirements of persistent objector status: states go about complying, but if one state claims persistent objector status, others can avoid formation of the incipient rule or simply claim persistent objector status themselves.

These settings are comparable to the chicken game, but instead of two wild teenagers hurtling towards a cliff, we have sophisticated diplomats sitting eyeball-to-eyeball. Although there may still be incentives to try to avoid contributing, and these incentives may sometimes hold sway, the diplomatic context takes place in a simultaneous and broadly linked setting, where unilateralism may be criticized and may be subject to punishment. In the CIL setting, it may be that the benefits of simultaneity are lost, but states may still anticipate the unraveling of cooperation and veer away from defection.

In order for a revision rule, as defined above, to operate, we must relax the assumption of strictly binding international law. Assume that all ten states accept the carbon reduction rule of CIL discussed above, under the circumstances hypothesized above. Then, assume that the tenth state, realizing that in fact international law is not strictly binding, and based on its best alternative under the prisoner's dilemma described, determines that the rule is no longer beneficial to it, and further determines to violate the rule. If the other states continue to comply, then the tenth state is in violation and will presumably experience some punishment. If a sufficiently large group of the other states use the violation by the tenth as an occasion to revisit their policy, and determine also to violate, then the original rule may unravel and be subject to revision. Note that the magnitude of the punishment, and the extent to which punishing the tenth benefits the other nine, may affect the course of action chosen by the other nine states.

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13. It seems reasonable here to elide the distinction between signature and adherence, as signature brings certain obligations, including obligations to seek ratification.

II. TREATIES AND CUSTOM

Interestingly, treaty law can have the same basic structure as that observed in connection with custom. A "persistent objector" is, in the broadest theoretical terms, analogous to a non-signatory, although persistent objector status seems to require affirmative action. Revision may occur, in accordance with the revision rule, by virtue of a new permissive CIL rule supervening a prior existing treaty. Of course, a finding of a supervening permissive CIL rule would have to involve a finding of *opinio juris* to the effect that the new permissive rule is the law. This finding would be especially difficult in connection with treaty, as opposed to custom, where the *opinio juris* would be required to contradict clear evidence of a written and binding *restrictive* rule. In effect, there would have to be some intermediate finding of desuetude[14]—that the rule is no longer in use—in order for the revision rule to work and revise the treaty.

Consider the Vienna Convention provisions for reservation, modification, withdrawal, and termination. For example, the default rule for treaty termination, under Article 56 of the Vienna Convention, is that individual states are not permitted to unilaterally withdraw from a treaty.[15] This provision would leave only the revision rule as a means of withdrawal. However, treaty law has more institutional alternatives. For example, Professor Helfer claims that withdrawal clauses are "pervasive."[16] In addition, it may be possible to have inter se amendments to multilateral treaties under Article 41 of the Vienna Convention, if such amendment is not prohibited by the treaty and (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.[17]

First, in a normative sense, we would hope that these structures allow states the opportunity to form efficient agreements, without limitations due to limited forms of agreement. As we consider efficiency, we should examine not just CIL alone, but also the combined opportunities provided by CIL and treaty law.

Second, from a normative standpoint, a "subsequent objector" rule—a rule allowing states to unilaterally denounce a rule of CIL post-formation—would often destroy the value of international law, depending on the costs,

14. *See* Michael Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 945 (2005).

15. Vienna Convention, *supra* note 4, at art. 56.

16. Laurence R. Helfer, *Exiting Treaties,* 91 VA. L. REV. 1579, 1582 (2005).

17. Vienna Convention, *supra* note 4, at art. 41.

including transaction costs, of denunciation. Based on a contract analogy, international law is valuable because it allows states to contract. By making international law susceptible to post-formation "subsequent objection," international law would often be unreliable. Therefore, CIL would have no utility to address collective action problems or other strategic problems where defection is a concern (although it might have continued utility to address coordination problems where there is no concern about defection). Therefore, a subsequent objector rule would often be normatively undesirable. Bradley and Gulati respond to this argument in their article by suggesting that withdrawal would take some time or would not affect pre-withdrawal obligations.[18] This response seems to concede the normative importance of the Mandatory View. It also fails to take into account that some rules will have greater asset specificity, making these points ineffective to protect a complying state from strategic behavior. They also argue that reputational or other informal inducements would prevent states from strategically withdrawing.[19] This argument seems to ignore the fact that the Default View proposal would remove the important reputational consequences of the existence of a mandatory legal rule.

Third, this normative evaluation would have to recognize that not all international legal contexts are the same. We have foundational rules of international law and contractual rules of international law. There is international law that responds to coordination problems and international law that responds to cooperation problems. And there is a range of different types of cooperation problems. For example, within the cooperation problems known as public goods problems, a variety of different types of aggregation technologies exist. Further, there may be variations in the timing of performance or in the structure of reciprocity that might be reflected in the international agreement. This is important because it affects the optimal structure of international legal rules. In the context of custom, we must ask if it makes sense to: (i) go forward with a rule despite persistent objection; (ii) allow states to withdraw subsequent to the formation of a legal rule; and then (iii) continue with a legal rule after one or more states have withdrawn.

Although there may be some range of cooperation problems for which a subsequent objector rule could be normatively desirable, the question then arises as to whether international law is useful in those contexts at all. This is the challenge that Bradley and Gulati must meet.

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18. Bradley & Gulati, *supra* note 1, at 258-59.

19. *Id.* at 259-60.

The problem with custom is that, under the present state of doctrine, it is impossible to respond explicitly and definitively, or precisely, to these institutional design variables. Rather, the doctrine of custom, unlike treaty law, cannot be self-consciously adapted to particular types of cooperation problems. This difficulty is one reason for the increasing marginalization of custom. Perhaps one explanation of the increasing codification of customary rules in the form of treaty is to facilitate institutional design. The following table compares some salient institutional options with respect to custom and treaties:

	CUSTOM	**TREATY**
Mode of Formation	Consensus	Unanimity
Possibility for Sub-Multilateral Rules	Regional	Sub-multilateral
Possibility for Abstention	Exclude persistent objectors	Exclude non-adherents
Possibility for Exit	No exit (except through new permissive custom)	Designed arrangements regarding exit
Effect on Subsequently-Established States	Binds subsequently established states	Does not bind subsequently established states
Modification	No amendment (except through new custom)	Designed arrangements regarding amendment

This comparison makes clear the greater design flexibility of treaties in all dimensions except for two: (i) consensus versus unanimity, and (ii) binding of subsequently established states. Custom provides for decision-making by consensus and binds subsequently established states, unlike treaties. Regarding decision-making by consensus, it is possible for a treaty to provide for such decision-making, but treaties themselves may not otherwise be established by consensus. However, the practical difference between consensus and unanimity is not necessarily great: states may be bound by silence under custom, whereas they cannot be bound by silence under a treaty.

The consensus rule may result in a fairly efficient, and surprisingly centralized, legislative process, both with respect to contemporaneously existing states, and with respect to subsequently established states. Oscar Schachter wrote that

> . . . as a historical fact, the great body of customary international law was made by remarkably few States. Only

> the States with navies—perhaps 3 or 4—made most of the law of the sea. Military power, exercised on land and sea, shaped the customary law of war and, to a large degree, the customary rules on territorial rights and principles of State responsibility.[20]

Indeed, critical legal scholars, post-colonial scholars, and others have explained that the formation of custom by metropolitan states, or by more advanced states, has a systematic bias against developing countries. So, in this sense, a rule of consensus is not necessarily normatively attractive. Furthermore, a rule of consensus might avoid domestic procedures for formal authorization or validation of the creation of international law. This avoidance, too, might or might not be normatively attractive, depending on the attractiveness of unrestricted executive action versus the attractiveness of parliamentary supervision.

CONCLUSION

Although treaties and custom have some differences as tools of cooperation, those differences are not necessarily very great. The main differences arise from the greater design flexibility of treaties and the greater scope for binding silent and subsequently established states to custom.

Costless exit provisions in treaties would be irrational under asset specificity. It is indeed curious that there is no "exit provision" in custom. This fact would limit the utility of custom to cases where no exit is required, as in fundamental procedural rules, such as some of the rules of treaty law, or where no exit should be permitted, as in cases of asset specificity. However, where there is no asset specificity, the cooperation problem is rather small—it may be a coordination problem—and there may be no need to depend on the binding force of international law in any event.

Bradley and Gulati's paper is best understood as an argument for more capability for self-conscious institutional design in CIL. The problem with their argument, which may be insurmountable, is how to include variation in design in a customary process. This problem would suggest a good reason to migrate to treaty law, but not necessarily a good reason to modify CIL doctrine.

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20. Oscar Schachter, *New Custom: Power,* Opinio Juris*, and Contrary Practice, in* THEORY OF INT'L LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 531, 536–37 (Jerzy Makarczyk ed., 1996).