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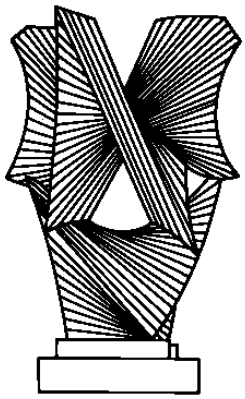

A THEORY OF CUSTOMARY INTERNATIONAL LAW

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Customary international law ("CIL") is one of two primary forms of international law, the other being the treaty. CIL is typically defined as a "customary practice of states followed from a sense of legal obligation."[3] Conventional wisdom views CIL as a unitary phenomenon that pervades international law and international relations. Governments take care to comply with CIL, and often incorporate its norms into domestic statutes. National courts apply CIL as a rule of decision, or a defense, or a canon of statutory construction. Nations argue about whether certain acts violate CIL. Violations of CIL are grounds for war or an international claim. Legal commentators view CIL to be at the core of the study of international law.

And yet CIL remains an enigma.[4] It lacks a centralized lawmaker, a centralized executive enforcer, and a centralized, authoritative decision-maker. The content of CIL seems to track the interests of powerful nations. The origin of CIL rules is not understood. We do not know why nations comply with CIL, or even what it means for a nation to comply with CIL. And we lack an explanation for the many changes in CIL rules over time. Both parts of CIL's standard definition raise perennial, and unanswered, questions. It is unclear which state acts count as evidence of a custom, or how broad or consistent state practice must be to satisfy the custom requirement. It is also unclear what it means for a nation to follow a custom from a sense of legal obligation, or how one determines whether such an obligation exists.

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2 Professor of Law, University of Chicago. Thanks to Jaqueline Bhabha, Richard Epstein, Tracey Meares, Richard Ross, Cass Sunstein, Doug Sylvester, Adrian Vermeule, and participants at a workshop at the University of Chicago Law School for comments, and to Christopher Chow, Kyle Gehrmann and Kathryn Walsh for research assistance.

3 Restatement (Third) of the Foreign Relations Law of the United States § 102(2) (1986).

4 See G.J.H. van Hoof, Rethinking the Sources of International Law 176-178 (1983) ("confusion and divergence of opinion . . . reign supreme as far as [CIL] is concerned"); David P. Fidler, Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law, 39 Ger. Y.B. Int'l L. 198, 198 (1997) ("CIL stands at the heart of modern international law while generating frustration and frictions in its identification and application. CIL appears indispensable and incomprehensible.").

This article presents a theory of CIL that seeks to sort out these and many other difficulties with the standard account of CIL. The theory uses simple game theoretical concepts to explain how what we call CIL arises, why nations "comply" with CIL as commonly understood, and how CIL changes.[5]

After briefly describing conventional wisdom about CIL in Section I, Section II presents the theory. This theory views the behaviors that are traditionally thought to constitute a unitary CIL as variations of one of four different behavioral logics. First, some of what is called CIL is better thought of as behavior arising from *coincidence of interest*, where behavioral regularities result from the private advantage each state obtains from the same action regardless of the action of the other. Second, some of what is called CIL is better thought of as arising from *coercion*, where a powerful state (or coalition of states with convergent interests) forces or threatens to force other states to engage in acts that they would not do in the absence of such force. Although we take no position on how the label "CIL" ought to be used, scholars who use this label to refer to behavior arising from coincidence of interest or coercion usually are under the erroneous impression that the behavior reflects successful international cooperation.

Third are cases of *true cooperation*. These cases are best modeled as a bilateral iterated prisoner's dilemma in which two states receive relatively high payoffs over the long term as long as both states resist the temptation to cheat in the short term. If certain conditions are met, the resulting behavioral regularity can be one in which the higher payoffs are obtained. Fourth, some behavioral regularities associated with CIL can arise when states face and solve bilateral *coordination* problems. In these cases, states receive higher payoffs if they take identical or symmetrical actions than if they do not. Both cooperation and coordination can be robust in bilateral contexts, but will not likely occur in multilateral contexts.

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5 Our approach has many affinities with the rational choice school in international relations. See Cooperation Under Anarchy (ed. Kenneth Oye 1986); James Morrow, Modeling the Forms of International Cooperation: Distribution Versus Information, 48 Int'l Org. 387 (1994); Duncan Snidal, Coordination Versus Prisoners' Dilemma: Implications for International Cooperation, 79 Am. Pol. Sc. Rev. 923 (1985). In recent years international law scholarship has begun to borrow heavily from the international relations literature. See Anne-Marie Slaughter, et al., International Law and International Relations: A New Generation of Interdisciplinary Scholarship, 92 Am. J. Int'l L. 367 (1998) (survey); Jeffrey Dunhoff & Joel Trachtman, Economic Analysis of International Law: An Invitation and a Caveat (forthcoming) (different survey). However, this literature contains no theory of CIL, a huge gap considering the fundamental role of CIL in international law. There has been no comprehensive analysis of customary international law through the lens of rational choice, game theory, and related approaches. See Dunhoff & Trachtman, supra, at __ (appendix). Michael Byers draws on the constructivist school of international relations to gives an account of CIL that differs from ours in methodology and conclusion. See Michael Byers, Custom, Power, and the Power of Rules, 17 Mich. J. Int'l L. 109 (1995). Fernando Teson briefly sketches a game-theoretic account of CIL in order to criticize it on positive and especially normative grounds. See Fernando Teson, A Philosophy of International Law 74-77 (1998).

The theory suggests that many international behavioral regularities result from states independently pursuing their self-interest without generating gains from interaction. These cases are trivial and have no normative content. Some international behavioral regularities do reflect cooperation or coordination, but the theory suggests that these regularities will arise in bilateral, not multilateral, interactions. What appear to be multilateral CIL norms, then, are illusions, the product of some combination of (a) coincidence of interests among all, or almost all, states, (b) coercion by one or a few powerful states, or (c) a prisoner's dilemma or a coordination game played out in discrete bilateral contexts.

This theory differs from the standard conception of CIL in several fundamental respects. It rejects the usual explanations of CIL based on *opinio juris*, legality, morality, and related concepts. States do not comply with norms of CIL because of a sense of moral or legal obligation; rather, their compliance and the norms themselves emerge from the states' pursuit of self-interested policies on the international stage. In other words, CIL is not an exogenous force that controls the behavior of states, the way domestic law controls the behavior of citizens; it is instead a label people attach to behavior that is generated endogenously from the interactions of states pursuing their self-interest. In addition, our theory rejects the traditional claim that the behaviors associated with CIL reflect a single, unitary logic. These behaviors instead reflect various and importantly different logical structures played out in discrete, historically contingent contexts. Finally, the theory is skeptical of the existence of law-like, multilateral behavioral regularities that are typically thought to constitute CIL. It holds that multinational regularities will invariably reflect coincidence of interest or coercion (and thus not be law-like), and that regularities that reflect cooperation or coordination arise only in bilateral contexts.

Section III tests the theory using case studies from four traditional areas of CIL: neutrality, diplomatic immunity, prize, and maritime jurisdiction. We chose to study these areas of the law because they represent a broad spectrum of CIL norms, and because these CIL norms are, according to conventional accounts, among the most robust that exist. The case studies teach several lessons. The main lesson is that CIL as traditionally understood has little explanatory power. The international behaviors said to constitute CIL are actually disparate and changing practices that follow different logics depending on the interaction of state interests in particular contexts. The case studies suggest that the behaviors associated with CIL do not reflect a unitary underlying logic, and that CIL understood as a normative force does no independent work in guiding national behavior. The case studies also reveal how commentators and

courts commit errors of induction in moving from the observation of a behavioral regularity to the conclusion that a CIL rule exists. In addition, in analyzing CIL courts and commentators rely too heavily on what nations say at the expense of what they do and why they do it, and they tend to limit CIL to behavioral regularities that are "good" from their normative perspective to be CIL, denigrating regularities that are bad as "comity" or a violation or an exception to the CIL rule. Finally, the case studies confirm that CIL does not reflect multilateral, law-like behavioral regularities.

Section IV considers several extensions of the analysis. It unpacks the artificial assumption of a unitary state interest that lies at the heart of our theory. This leads us to examine domestic constitutional arrangements that identify and enforce the national interest implicated by CIL. Section IV also considers what our theory might teach about the other main form of international law, the treaty. In addition, it speculates about how our theory fits with contemporary discussions about the role of international organizations. Finally, it examines the implications of our analysis for modern international human rights law.

I. Standard Views of CIL

The treaty and CIL are the two primary forms of international law. Because they lack a centralized judicial and enforcement regime, and because violations often go unpunished, both treaties and CIL have long been plagued by doubts about whether they establish genuine legal obligations.[6] CIL suffers additional doubts about its legitimacy that do not burden treaties. Treaties are express promises that are almost always embodied in written form; they often have built-in dispute resolution mechanisms such as international arbitration; and they only bind signatories. By contrast, CIL is unwritten; it is said to arise spontaneously from the decentralized practices of nations; the criteria for its identification are (as we shall more fully below) unclear; it is said to bind all nations in the world; and it does not contain within itself a mechanism for resolving disputes and enforcing its norms. Nonetheless, conventional wisdom holds that the obligations created by CIL bind nations with the same force as treaties.[7]

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6 For overviews, see D.J. Harris, Cases and Materials on International Law 1-15 (1998); Louis Henkin, et al, International Law 10-41 (3d ed. 1994).

7 See Restatement (Third), supra note 1, § 102 cmt. j.

CIL is typically defined as the collection of international behavioral regularities that nations over time come to view as binding on them as a matter of law.[8] This standard definition contain two elements. There must be a widespread and uniform practice of nations. And nations must engage in the practice out of a sense of legal obligation. This second requirement, often referred to as *opinio juris*, is the central concept of CIL. Because *opinio juris* refers to the reason why a nation acts in accordance with a behavioral regularity, it is often described as the "psychological" element of CIL.[9] It is what distinguishes a national act done voluntarily or out of comity from one that a nation follows because required to do so by law. Courts and scholars say that a longstanding practice among nations "ripens" or "hardens" into a rule of CIL when it becomes accepted by nations as legally binding.[10]

This standard account of CIL suffers from well-known difficulties.[11] No one agrees about which types of national actions count as state practice.[12] Policy statements, national legislation, and diplomatic correspondence are the least controversial sources. Treaties — especially multilateral treaties, but also bilateral ones — are often used as evidence of CIL, but in an inconsistent and under-theorized way.[13] The writings of jurists are a common but highly tendentious source of CIL.[14] Even more controversially, United Nations General Assembly Resolutions and other non-binding statements and resolutions by multilateral bodies are often viewed as evidence of CIL.[15] Those who study and use CIL – courts, arbitrators, diplomats, politicians, scholars – invoke these sources selectively and usually tendentiously.

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8 See id., § 102(2) (defining CIL as "general and consistent practice that states follow from a sense of legal obligation"); Statute of the International Court of Justice, art. 38(1)(b) (including within sources of international law "international custom, as evidence of a general practice accepted as law").

9 See Ian Brownlie, Principles of Public International Law 7-9 (4th ed. 1990); Anthony D'Amato, The Concept of Custom in International Law 47-55, 66-73 (1971).

10 See, e.g., The Paquete Habana, 175 U.S. 677 (1900) ("By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, cost fishing vessels . . . have been recognized as exempt . . . from capture as prize of war.")

11 See D'Amato, supra note __; Fidler, supra note __.

12 See Fidler, supra note __, at 201-04; Brownlie, supra note __, at 5.

13 See H.W.A. Thirlway, International Customary Law and Codification 80-94 (1972); Wolfke, supra note __, at 68-72.

14 See, for example, Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995); see generally Brownlie, supra note __, at 24-25 (noting reasons for "caution" in using publicists as a source of law); G.J.H. van Hoof, Rethinking the Sources of International Law 176-178 (1983) (explaining and criticizing role of publicists).

15 For analyses of the significance for CIL of General Assembly Resolutions, see Oscar Schacter, International Law in Theory and Practice, 178 Res. des Cours 111-121 (1982-V); Wolkfke, supra note __, at 84; Stephen M. Schwebel, The Effect of Resolutions of the U.N. General Assembly on Customary International Law, 1979 Proc. Am. Soc. Int'l L. 301.

No one, moreover, agrees about how widespread and uniform state practice must be. In theory the practice is supposed to be "general" in the sense that all or almost all of the nations of the world engage in it.[16] But it is practically impossible to determine whether 190 or so nations of the world engage in a particular practice. CIL is thus usually based on a highly selective survey of state practice that includes major powers and interested nations.[17] Increasingly, courts and scholars sometimes ignore the state practice requirement altogether.[18] For example, they refer to a CIL prohibition on torture at the same time that they acknowledge that many nations of the world torture their citizens.[19] It is thus unclear when, and to what degree, the state practice requirement must be satisfied.

The *opinio juris* requirement raises more problems.[20] To what does the psychological state refer? How does one identify it? There are no settled answers. Courts and scholars sometimes infer it from the existence of a widespread behavioral regularity.[21] But if *opinio juris* can be inferred from behavioral regularities, it is redundant with the requirement of a widespread and uniform state practice, which, by concession, is insufficient by itself to establish CIL. To avoid this problem, courts and scholars sometimes (but only sometimes) require independent evidence that a nation acted from a sense of obligation, such as a statement by an important government official, ratification of a treaty that contains a norm similar to the CIL norm in question, or an attitude of approval toward a General Assembly Resolution.[22] The appropriate conditions on the use of such evidence remains unsettled, and indeed the evidence is never considered in a systematic fashion.

These definitional problems with *opinio juris* flow in part from more serious conceptual difficulties. There is no convincing explanation of the process by which a

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16 See Brownlie, supra note __, at 5-6.

17 See Wolfke, supra note __, at 78-79; Jonathan Charney, Universal International Law, 87 Am. J. Int'l L. 529, 537 (1993).

18 See Curtis A. Bradley and Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 839-40 (1997).

19 See Filartiga v. Penal-Irala, 630 F.2d 876, 882 (2d Cir. 1980); Bruno Simma & Philip Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, 12 Austl. Y.B. Int'l L. 82, 90 (1992).

20 See Thirlway, supra note, at 47 ("The precise definition of the *opinio juris*, the psychological element in the formation of custom, the philosopher's stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules, has probably caused more academic controversy than all the actual contested claims made by states on the basis of alleged custom, put together.").

21 See Brownlie, supra note __, at 7 (citing examples).

22 Id. at 7-9 (citing examples).

voluntary behavioral regularity transforms itself into a binding legal obligation.[23] *Opinio juris* is described as the psychological component of CIL because it refers to an attitude that nations supposedly have toward a behavioral regularity. The idea is mysterious because the legal obligation is created by a nation's belief in the existence of the legal obligation. As D'Amato notes, this is circular reasoning.[24] *Opinio juris* is really a conclusion about a practice's status as international law; it does not explain *how* a widespread and uniform practice becomes law.

We have described some of the many uncertainties that bedevil the standard conception of CIL. These problems are well known. They are the subject of an enormous literature that endlessly (and in our opinion unproductively) debates definitional issues, the relative significance of practice and *opinio juris*, and other conceptual matters internal to the traditional account.[25] Although our theory has implications for many of these issues, such issues are not the main focus of our analysis. Instead, we focus on two sets of issues that are rarely discussed in the international law literature, but that are fundamental to understanding CIL.

The first set of issues concerns the unarticulated and undefended assumptions that underlie the traditional conception of CIL. Despite the many disagreements within the traditional paradigm, the parties to this debate assume that CIL is *unitary*, *universal*, and *exogenous*. CIL is unitary in the sense that all the behaviors it describes have an identical logical form that is described in the standard definition. CIL is universal in the sense that its obligations bind all nations except those that "persistently object" during the development of the CIL norm.[26] And CIL is an exogenous influence on national behavior in the sense that it guides, shapes, and influences national actions. When nations are law-abiding they conform their behavior to CIL. When they violate CIL they act in defiance of it. Our theory of CIL challenges each of these assumptions.

The second set of issues on which we focus concerns the traditional paradigm's inability to explain international behavior. For example, the traditional paradigm has

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23 For a catalogue of failed attempts, see D'Amato, supra note __, at 47-56, 66-72.

24 D'amato captures this circularity with a question: "How can custom create law if its psychological component requires action in conscious accordance with law preexisting the action"? D'Amato, supra note __, at 66. He analyzes the many futile attempts to avoid this paradox, id. at 47-56, 66-68.

25 The canonical treatments of CIL include D'Amato, supra note __; Wolfke, supra note __; Thirlway, supra note __; and Michael Akehurst, Custom as a Source of International Law, 47 Brit. Y.B. Int'l L. 1 (1974-1975).

26 On the persistent objector rule, see Restatement (Third), supra note __, at § 102, comment d; Ted L. Stein, The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law, 26 Harv. Int'l L. J. 457 (1985).

no account for how CIL originates.[27] It does not explain how international behavioral regularities emerge from disorder. As we saw above, it also fails to explain how nations move from a "mere" behavioral regularity to a behavioral regularity that nations follow from a sense of legal obligation.

The traditional account cannot explain how CIL rules change over time.[28] To take one of scores of examples: the ostensible CIL rule governing a nation's jurisdiction over its coasts changed from a cannon-shot rule to a three-mile rule to a twelve mile rule with many qualifications.[29] On the traditional account, the process of change is necessarily illegal, since some states must initiate a departure from the prior regularity that they were bound to follow as a matter of law. More broadly, the traditional account does not explain why CIL changes track the interests of powerful nations, or why technological changes and other exogenous factors often produce significant changes in the content of CIL.

The traditional account also cannot explain several pervasive features of the way nations perceive and use CIL. It cannot account for the fact that nations frequently change their views about the content of CIL, often during very short periods of time.[30] Nor, relatedly, can it explain why courts and politicians almost always apply a conception of CIL that is in the nation's best interest.[31] It also does not explain why nations often say that they will abide by a particular norm of CIL, and then violate their promises.[32]

Finally, the traditional account does not explain why nations comply with CIL. Why would a nation ever comply with CIL when it is not in its interest to do so? The traditional account assumes that this is what nations do when they appear to act in accordance with CIL. But as noted above, *opinio juris* begs the question of why nations feel obliged to obey CIL. Moreover, the traditional theory does not explain why, if nations obey CIL from a sense of legal obligation, they ever *violate* CIL.

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27 See D'Amato, supra note __, at 4.

28 See id.; Hoof, supra note __, at 97-105.

29 This is a simplification. We explore this rule more fully infra.

30 For examples, see infra __.

31 For examples, see infra __.

32 For examples, see infra __.

There are numerous more general theories about why nations obey international law.[33] The large majority of these theories focus exclusively on, and have relevance only for, treaties.[34] But some purport to apply to treaties and CIL alike. Some positivist theorists argue that nations obey international law -- including CIL -- because they *consent* to it.[35] But as many have noted, this position begs the question of why nations abide by the international rules to which they have consented.[36] A prominent theory in the natural law tradition contends that nations abide by CIL because "they perceive the rule and its institutional penumbra to have a high degree of legitimacy," where legitimacy is understood as "a property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles or right process."[37] Another theory argues that "repeated compliance [with international law] becomes habitual obedience" as international law "penetrates into a domestic legal system, thus becoming part of that nation's internal value set."[38] Yet another prominent theory purports to begin from the more rationalistic premise that nations "observe international obligations unless violation promises an important balance of advantage over cost," but ultimately explaining international compliance on the basis of morality and the "habit and inertia of continued compliance."[39] "Right process," "value set," "habit," and "morality" are empty phrases in these theories. They stand in for the concept of *opinio juris* without explaining what it means.

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33 For a comprehensive survey, see Harold Hongju Koh, Why Do Nations Obey International Law?, 106 Yale L. J. 2608 (1997); see also Oscar Schacter, Towards a Theory of International Obligation , 8 Va. J. Int'l L. 300, 301 (1968) (earlier survey noting "[n]o single theory [of international obligation] has received general agreement and sometimes it seems as though there are as many theories or at least formulations as there are scholars"). Most of the literature canvassed in Koh, supra, limits itself to treaty compliance.

34 To take a prominent recent example, the Chayes' management theory only purports to account for international regulatory regimes established by treaty. See Abraham Chayes and Antonia Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1995). In addition, all of the recent empirical work on compliance with international law has focused on treaties rather than CIL. See Harold Hongju Koh, Why Do Nations Obey International Law?, 106 Yale L. J. 2599, 2599 n. 2 (1997). For our account of why treaties might foster international cooperation more successfully than CIL, see infra __.

35 See J. Brierly, The Law of Nations, 53-56 (6th ed. 1963).

36 See id.

37 Thomas Franck, Fairness in International Law and Institutions 24-25 (1995).

38 Harold Hongju Koh, Why Do Nations Obey International Law?, 106 Yale L. J. 2599, 2603 (1997).

39 Louis Henkin, How Nations Behave 49, 58-63 (2d ed 1979). The rational choice strand of international relations attempts to explain international cooperation without falling back on notions of morality or *opinio juris.* See sources cited supra note __. As we explained in note __, this is the tradition we are working in, a tradition that has not to date been invoked to account for CIL.

There are scores of other theories of international law compliance.[40] This is not the place to catalog these theories' many shortcomings, at least as applied to CIL. Most of them suffer from the difficulties described above. They provide accounts of international behavioral regularities at very high levels of generality; they view international law as an exogenous influence on international behavior rather than explaining it or why nations obey it; they do not account for when or why nations violate the international law; and they do not explain how international law originates or changes.

II. A Revisionist Theory

This Section sets forth our revisionist theory of CIL. The theory uses simple game theoretical concepts to explain international behavioral regularities as a function of nations pursuing self-interest.[41] We argue that nations pursuing self-interest produce behavioral regularities in four strategic situations: *coincidence of interest*, *coercion*, the *bilateral iterated prisoner's dilemma*, and *coordination*. All of the international behaviors subsumed by the label CIL are variations on one of these four strategic forms. In contrast to the traditional understanding of CIL, the theory rejects the notion that international behavioral regularities result from compliance with a norm that a nation feels legally obliged to follow. It claims that the direction of causality is the reverse. It is not the case that an exogenous, reified entity known as CIL causes nations to act in certain ways; rather, CIL is the label people attach to behavioral regularities that arise endogenously from the interaction of nations pursuing their self-interest.

A word of caution is in order at the outset concerning our use of concepts from game theory. We use these concepts to organize our ideas and intuitions and to clarify the assumptions made by us and those we criticize. We do not claim that the axioms of game theory accurately represent the decision-making process of a "state" in all its complexity.[42] Because the premises of the theory are relatively crude, the theory's predictions lack nuance and subtlety. But a theory is successful if it provides a more coherent and plausible account of behavior than rival theories do, and if it allows one to

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40 Schacter, supra note __, at 301, lists thirteen theories. Koh, supra note __, canvasses dozens.

41 Discussions of the game theoretic concepts we use can be found in standard game theory textbooks. Two particularly lucid and relevant treatments are Douglas G. Baird, Robert H. Gertner, and Randal C. Picker, Game Theory and the Law (1994), which shows how game theory can be used to understand law (but not international law), and James D. Morrow, Game Theory for Political Scientists (1994), which shows how game theory can be used to understand international relations. Another useful reference is Oye, supra note __.

42 We explore this issue further in Section IVA.

see old problems in new and fruitful ways.[43] The success of our argument, then, depends on both its theoretical plausibility (the subject of this Section) and its empirical implications (the subject of the next Section).

A. The Basic Model.

What courts and scholars call CIL refers to certain behavioral regularities that emerge in international games played among states. In this Section we describe the four strategic positions that we believe capture the behavioral regularities thought to constitute CIL. For expository clarity, we initially discuss interactions between two states; then, we discuss the extent to which the conclusions of this discussion can be extended to interactions among more than two states. We then explain how the basic model differs from the traditional conception of CIL.

1. Coincidence of Interest

The first position is one of *coincidence of interest*, where states engage in behavioral regularities simply because each obtains private advantages from the same action irrespective of the action of the other. Table 1 illustrates such a situation.

Table 1

	attack	ignore
attack	-2, -2	-1, 2
ignore	2, -1	3, 3

Table 1 might describe the position of two belligerent states that have navies that patrol a body of water also used by civilian fishing boats from both states. A state's naval vessels are expensive to operate and have important uses (such as protecting the state from invasion), and the fishing boats are not worth very much. Payoffs in Table 1 are based on the assumptions that a state enjoys a payoff of 3 if it neither attacks the boats of the other state nor is subject to an attack; the state incurs a cost of 1 in order to seize the fishing boats of the other state; and the state loses 1 if its fishing boats are attacked.

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[43] For a discussion of the advantages and limitations of using game theory to analyze international relations, see Duncan Snidal, The Game *Theory* of International Politics, in Oye, supra note __; and for more general critical comments, see David M. Kreps, Game Theory and Economic Modelling ch. 5 (1990).

To determine the equilibrium of the game, assume first that one player ("state j") attacks the boats of the other player ("state i"). State i obtains a higher payoff (2) if its navy does not attack the fishing boats of state j, than it obtains if it does attack and seize these boats (-2). Now assume that state j does not attack the boats of state i. State i obtains a higher payoff (3) if it ignores than if it attacks (-1). Accordingly, state i ignores state j's boats regardless of state j's behavior. Because state j's payoffs are the same as state i's, state j ignores state i's boats as well. Thus, in equilibrium each state ignores the boats of the other state. By an "equilibrium," we mean that the states will continue engaging in this behavior as long as payoffs do not change. Thus, when an equilibrium occurs, one would observe a behavior regularity -- in this case, a behavioral regularity consisting of each state ignoring the boats of the other.

This behavioral regularity is one possible explanation for what is referred to as CIL.[44] Notice that in equilibrium the states act according to their self-interest. Although an observer might applaud the outcome because the states refrain from belligerence, the outcome is no more surprising than the fact that states do not sink their own ships. States independently pursuing their own interests will engage in symmetrical or identical actions which do not cause harm to anyone, simply because the states gain nothing by deviating from those actions.

2. Coercion

A second type of strategic position in which states find themselves can be called *coercion*. One state, or a coalition of states with convergent interests, force other states to engage in actions that serve the interest of the first state or states. To understand this strategic situation, imagine a game in which a large and powerful state initially can threaten to punish (or not) any small state that engages in any action X. The small state then chooses whether to engage in the action or not, and the large state responds by punishing the small state or not. The game then repeats itself. The large state receives its highest payoff if the small state does not engage in X, and the cost of punishing the small state is trivial. The small state receives a higher payoff if it does not engage in X and is not punished, than if it does engage in X and is punished. In equilibrium the large state makes the threat, the small state does not engage in X, and the large state does not punish the small state. The small state does not deviate because the large state

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44 Cf. Kenneth A. Oye, Explaining Cooperation under Anarchy: Hypotheses and Strategies 6, in Oye, supra note __. Oye argues that states often obtain mutual gains by acting independently, and refers to the classical liberal defense of free trade, according to which every state does best if it eliminates tariffs regardless of whether other states do. The example is slightly misleading, because gains exist only against the implicit baseline of protectionism. Our example, below, of states not sinking their own ships is formally identical, except self-interest leads to maintenance of the status quo rather than "mutual gains" except in the most attenuated sense.

would punish it if it did. If the small state did deviate, the large state would punish the small state, because the cost of punishment is low and otherwise the large state's threats would have no effect on behavior in future rounds.[45]

As an example, suppose that state i, a large and powerful nation, wishes to prevent small state j from attacking i's civilian fishing boats. State i threatens state j by announcing that if state j does not stop its attacks, state i will destroy j's navy. If state i cares enough about preventing j's attacks, and the cost of punishing state j is low enough, state i's threat will be credible, and state j will cease attacking the fishing vessels. If, for its own reasons, state i does not attack state j's fishing boats, then observers will perceive a behavioral regularity consisting of states i and j not attacking each other's civilian fishing boats. They may conclude that a rule of CIL prohibits the seizure of fishing boats. But this harmonious result is produced by force.[46] Indeed, the application of force is more obvious when the weak party is passive. For example, state i might seize colonies of state j and threaten j with destruction if j resists. Observers might hesitate about calling the outcome a norm of CIL, but the structure of the game is identical to that of the first example.

Coercion and coincidence of interest differ according to the degree to which a state's best action depends on the action of the other state. Coincidence of interest exists when a state's best action is independent of the action of the other state. Coercion exists when the weak state's best action depends on the strong state's action, and the strong state would punish the weak state if the weak state chose the action that does not maximize the strong state's payoff.

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45 This game is based on models of entry deterrence in industrial organization. In those models, a firm or entrepreneur must decide whether to enter a market dominated by a monopolist, then the monopolist must decide whether to retaliate by cutting prices and expanding production. Several different models show that the monopolist can deter entry either by making a credible threat that it will cut prices or by in fact cutting prices prior to entry. In the simplest model, which we use in the text, the monopolist cuts prices after entry in order to show future entrants that it will retaliate. In another model, some monopolists are irrational (or prone to bad judgment) and others are rational; irrational monopolists retaliate by cutting prices in the second period, while rational monopolists mimic the irrational monopolist in order to deter future entrants. In a signaling model, the entrant does not know whether the monoplist has high or low costs, and the low-cost monopolist signals its low costs by charging low prices. In international relations, the analogies would be (i) powerful states sometimes being spiteful or irrational, and attacking weak states that do not do their bidding even though the cost of attacking them exceeds the benefit of successful coercion in a single round; or (ii) some powerful states having cheaper militaries than others, and occasionally engaging in gratuitous displays of military might in order to reveal this private information to weaker countries. For discussions of the predatory pricing literature, see Baird et al., supra note __ at 178-86, and Jean Tirole, The Theory of Industrial Organization 367-74 (1997).

46 Alternatively, the large state might promise to give money to the small state if it stops seizing fishing boats. The strategic structure of the game is the same whether the large state makes a threat or offers a bribe, the difference being whether the outcome for the small state is better or worse than the status quo.

3. Cooperation

The third basic type of strategic position in which states find themselves is that of the bilateral repeat prisoner's dilemma. Table 2 illustrates one stage of such a game.

Table 2

	attack	ignore
attack	2, 2	4, 1
ignore	1, 4	3, 3

Consider the differences between this example and the coincidence of interest example. With coincidence of interest the state incurs a cost of 1 in order to attack fishing vessels and gains nothing. Here, the state incurs a cost of 1 and gains 2, while a state loses 2 if it is attacked. The coincidence of interest situation might correspond to modern conditions, when it is costly to operate a navy and the gains from seizing an enemy's civilian fishing boats are quite low, because they are worth very little as prizes or as means for disrupting the enemy's economy. The prisoner's dilemma example might correspond to conditions under which it is not so costly to operate a navy and fishing boats are valuable or play an important role in the enemy's economy. The analysis of this example is familiar. State i obtains a higher payoff from seizing state j's fishing boats, regardless of whether state j also seize state i's boats (2>1) or not (4>3). State j's payoffs are symmetrical. Therefore, if Table 2 describes the whole game, and there is no possibility of future action or international sanctions, both states will seize the fishing boats of the other, and the jointly minimizing outcome is obtained.

As is well known, when the prisoner's dilemma is repeated over an indefinite period of time, the optimal outcome ((ignore, ignore) in our case) becomes possible in each round.[47] Thus, one might hypothesize that each state will ignore the other state's fishing boats as long as the states expect to interact with each other over time. If they do so, the resulting equilibrium might be described as a norm of CIL. But many conditions must be satisfied before this result can be achieved.[48]

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47 See standard game theory texts such as Baird et al., supra note __, and Robert Gibbons, Game Theory for Applied Economists 82-99 (1992).

48 The conditions examined in the paragraphs that follow are standard in the game theory literature. For more detailed discussions, see Baird et al, supra note __, at 165-78; Morrow, supra note __, at 260-79.

First, the players must have sufficiently low discount rates: they care about the future relative to the present.[49] Individuals who are impulsive or impatient or who do not care about the future have high discount rates. Such individuals cannot cooperate in an iterated prisoner's dilemma because they cannot resist cheating in round n, rather than in round n+1, so their threat to punish the other party in round n+1 if the latter cheats in round n is not credible. The international analogy to the impulsive individual is the *rogue state*. Rogue states are states controlled by irrational or impulsive leaders, or states with unstable political systems, or states in which citizens do not enjoy stable expectations. Such states can be modeled as having high discount rates. Ordinary states will not cooperate with rogue states for the same reason that disciplined individuals do not cooperate with impulsive individuals: they do not trust them.

Second, the game must continue indefinitely, in the sense that players expect it either never to end or to end only with a sufficiently low probability.[50] Care should be taken when analyzing the parameters of a game. Norms of war (such as the humane treatment of prisoners) might exist because (a) belligerents foresee interaction ceasing at the end of the war but do not know when the war will end, and refrain from "cheating" during the war (such as killing prisoners) in the expectation that the enemy will do the same; (b) belligerents foresee interaction continuing after the war ends, and fear that "cheating" during the war may invite retaliation after the war; or (c) belligerents care about their reputation among neutrals, and fear that neutrals will interpret their failure to abide by the norms of war as an indication that they have low discount rates and thus are untrustworthy partners for alliances. This last possibility requires a more complicated model, and we will analyze such a model in Section II.C. For present purposes, it is sufficient to note that analysis of customs between states, such as their treatment of each other's civilian fishing vessels, should not overlook the influence of future interaction between the states outside the narrow context of the game.

Third, the payoffs from defection must not be too high relative to the payoffs from cooperation. Notice that because payoffs may change over time, a relationship may succeed for a while and then, after a sudden change in payoffs, collapse. Imagine two neighboring states that do not seize each other's fishing boats in a repeat game characterized by stage games with the payoffs described in Table 2. State i receives (2 +

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49 Discount rate refers to the degree to which a person prefers current payoffs to future payoffs. Suppose a person expects to receive $100 in one year. A person with a high discount rate of, say, 0.5 is indifferent between that amount in one year and about $67 today. A person with a low discount rate of, say, 0.1 is indifferent between that amount in one year and about $91 today. See Gibbons, supra note __ at 68-69 n.7.

50 In more sophisticated analyses, this is not required: it is sufficient if players believe the game will not end for a long time and there is a small probability that a player is irrational or will make an error. See Morrow, supra note __ at 283-91.

$d2 + d^2 2 + ...$) from cooperating, which exceeds the payoff from cheating on the first round assuming that State j plays the "grim" strategy and retaliates by refusing to cooperate in all future rounds ($4 + 0 + 0 + ...$), given a sufficiently high d, where d refers to the discount factor.[51] Suppose that because of an exogenous change the one-time payoff from cheating rises to 100. Then, given the right d, State i will cheat rather than cooperate, and State j will retaliate by cheating. Cooperation disappears.

Fourth, players must choose sufficiently cooperative strategies, such as tit-for-tat or a variant. Strategies that are too forgiving invite exploitation; strategies that are too nasty risk a breakdown in cooperation. If states initially choose strategies randomly, and then less successful states imitate the strategies of more successful states, then it is plausible that over time the better strategies will drive out the worse strategies.[52]

Fifth, the action that will overcome the prisoner's dilemma must be clear, and identical or symmetrical. Not seizing fishing vessels is clear and identical for both states. If, however, the optimal action were seizing fishing vessels 32 percent of the time, the action would not be clear — and if it were 32 percent for one state and 47 percent for other, it would not be identical or symmetrical. There must be a "focal point" that determines the optimal action (more about which below); otherwise, the states cannot coordinate on a solution to the prisoner's dilemma without a treaty or formal understanding.[53]

The bilateral prisoner's dilemma results in a jointly maximizing outcome only if these conditions are met. By contrast, the coincidence of interest case results in the jointly maximizing outcome regardless of whether these conditions are met. Thus, the value-maximizing equilibrium in the bilateral prisoner's dilemma is not as robust. But by the same token, it is not banal. It reflects true international cooperation and thus seems much more law-like than the equilibrium that results from coincidence of interest, at least if we are to restrict the term "international law" to circumstances in which states interact and their interactions matter.

The bilateral repeat prisoner's dilemma differs from the coercion case along two dimensions. First, the cooperative equilibrium (in the first game) depends on both states threatening each other with deviation rather than just the more powerful state (in the second game) threatening the weaker state with punishment if it deviates. Second, both states prefer the equilibrium that is sustained by threats to the equilibrium that

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51 If r is the discount rate, d=1/(1+r). See Gibbons, supra note __ at 68-69 n.7.

52 See Axelrod, supra note __.

53 On focal points, see Thomas Schelling, The Strategy of Conflict 57 (1960).

results when both states deviate (in the first game), rather than just the more powerful state preferring the equilibrium that is sustained by its threats and the weaker state preferring the equilibrium in which the threat is not credible and not carried out (in the second game). Everything else being equal, the coercion equilibrium might seem more robust than the cooperative equilibrium, because the former requires only the powerful state's threat to be credible, whereas the latter requires both states' threats to be credible.

4. Coordination.

The fourth strategic position in which states find themselves is one of *coordination*. In the pure two-state coordination game, the states' interests converge, like the case of coincidence of interest; but unlike the latter case, each state's best move depends on the move of the other state. Consider Table 3.

Table 3

	action X	action Y
action X	3, 3	0, 0
action Y	0, 0	3, 3

Each state prefers to engage in X if the other state engages in X, and each state prefers to engage in Y if the other state engages in Y. There are two Pareto-optimal pure-strategy equilibria: {X,X} and {Y,Y}. Once the states coordinate on one action, neither state will deviate. The main problem is that of the first move. If state i does not know whether state j will choose X or Y, then state i does not know whether to choose X or Y. Both states might choose their first and subsequent moves at random, resulting in a mixed-strategy equilibrium in which the parties fail to obtain the full gains from coordination.[54]

A simple example is coordination on a border between two states. Suppose that action X is "patrol up to the river," and action Y is "patrol up to the road." The river and road cross but divide the territory evenly. The states are indifferent about whether the river or the road should divide their territories, but want to avoid conflicts between their patrols. Once it is established that the equilibrium action is X (or Y), neither state will deviate from that action. To see why, suppose that state i knows that state j engages in X. Then state i does better by also engaging in X than by engaging Y. If

54 For a discussion, see Baird et al., supra note __ at 40.

instead state i believes that state j engages in Y, state i does better by engaging in Y than by engaging in X.

Coordination problems also arise as in the course of solving the repeat prisoner's dilemma. Although repeat play can overcome the incentives to cheat in one round of the prisoner's dilemma, there remains a problem of coordination over which moves count as cooperative moves and which moves count as defections. For example, part of state i's and state j's problem in overcoming the incentives to seize each other's fishing vessels involves identifying which seizures are permitted and which are not permitted. Can one seize a fishing vessel if it contains spies? What if the sailors are not spies but have observed secret maneuvers? Why is it that states may seize large commercial ships but not small vessels, and how does one draw the line? A repeated prisoner's dilemma, when discount rates are low enough, is not the same thing as a one-shot prisoner's dilemma, but is instead a kind of coordination game.[55]

If states hold different expectations about what counts as cooperation, cooperation will not get started or will break down. Suppose, for example, that states i and j cooperate by not seizing each other's small coastal fishing vessels. As a result of technological and economic change, civilians on both sides begin to sail large fishing vessels in the coastal waters. State i assumes that such vessels are fair game, because they are large; state j assumes that such vessels are protected, because they stick to the coast. When state i's navy seizes one such vessel innocently, state j misinterprets this action as defection and responds by seizing state i's small coastal fishing vessels. Then state i will retaliate, and cooperation will break down. In the absence of communication (on which, see below), cooperation in the repeat prisoner's dilemma is likely to fail if rapid technological and economic change frequently alters the parties' expectations or creates ambiguity about the meaning of their actions.[56]

5. On the Possibility of Multinational CIL Norms

One of the central claims of the standard account of CIL is that CIL norms govern all or almost all states, or at least all "civilized" states. This universality claim is rarely

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55 See Baird et al., supra note __, at 173-74; Morrow, supra note __, at 267-68.

56 There are many variations on the pure coordination game. One equilibrium might produce higher payoffs for both parties than the other; then coordination may be easy. Or each party does better in a different pure-strategy equilibrium, in which case coordination may be very difficult. This is the "Battle of the Sexes" game. Morrow analyzes the treaty on wireless communications as a Battle of the Sexes game, because all states preferred coordinating on some standard rather than on none, but some standards benefitted some states more than others. See James D. Morrow, Modelling the Forms of International Cooperation: Distribution Versus Information, 48 Intern'l Org. 387 (1994).

explained further. The idea is probably that certain public goods can be created only if all or most states participate by engaging in certain actions that they would not engage in if they acted independently. World peace, the preservation of the ozone layer, the maintenance of international fisheries, and coordination on standards for international communication and transportation are examples of such public goods. International scholars appear to believe that CIL norms evolve in order to enable states to create these n-state public goods.

Our theory rejects this view. It holds that most instances of spontaneous international cooperation arise as the result of pairwise interactions. Apparently cooperative universal behavioral regularities are illusory, the result of identical pairwise interactions, coincidence of interest, or coercion. When n-state public goods are created, it is because states enter treaties and other agreements that solve n-state coordination games, not because of the evolution of universal and exogenous CIL norms.

To understand the illusory quality of universal CIL norms, imagine that we observe that no state seizes civilian fishing vessels from enemies in times of war. The theory contemplates many possible explanations for this observation.

First, states do not seize fishing boats because of coincidence of interest. The nations do not seize boats because their navies are more effectively used by attacking enemy warships or large merchant vessels. Second, many nations receive no benefit from seizing fishing boats, and those that otherwise would receive a benefit are deterred from doing so by powerful nations that have an interest in preventing seizures of their own boats. Third, two nations decline to seize fishing boats in a bilateral repeat prisoner's dilemma, and all the other nations decline to do so because of coincidence of interest (or coercion), or -- it is possible -- all or most nations face each other in exclusive bilateral repeat prisoner's dilemmas and refrain from seizing fishing vessels because of fear of retaliation from their (single) opponent. For example, all bodies of water containing fish under the conditions described above are bordered by exactly two states. Fourth, some or all nations face each other in bilateral coordination games which they solve, while any other nations engage in the same action because of coincidence of interest, coercion, or their participation in a bilateral prisoner's dilemma. There are numerous other possible combinations of coincidence of interest, coercion, bilateral prisoner's dilemmas, and bilateral coordination. In all these cases, some or many states refrain from seizing fishing vessels because they have better uses for their navy, or because they fear retaliation from the state whose fishing vessels they covet. In none of these cases is an n-state public good created through multilateral cooperation.

Our essential claim is that all examples of robust CIL norms are explained in these ways. Although states often engage in virtually identical behavior -- protecting foreign ambassadors, for example[57] -- they do so because they have no interest in deviating or because they fear retaliation from the state they victimize. The norm is universal in a trivial sense only, like the norm that states do not drill holes in the bottoms of their own ships; it does not reflect true multilateral cooperation.

But what is the basis for our skepticism about the spontaneous evolution of true multilateral cooperation? To answer this question, we focus on the assumptions necessary to explain multilateral cooperation in repeat prisoner's dilemmas and in coordination games.

The n-state repeat prisoner's dilemma should be sharply distinguished from the 2-state version of this game. An example of the n-state game is a fishery surrounded by many states, as opposed to a fishery (in a small lake, for example) that is surrounded and controlled by only two states. Table 2, which was used to illustrate the 2-state prisoner's dilemma, can also be used to illustrate the n-state version, except with the interpretation that the row player represents any given state, and the column player represents all the other states. Each state does better by overfishing, whether or not other states overfish; therefore, all states will overfish. One might ask whether the state would refrain from overfishing in order to avoid retaliation by other states. The fishery could be preserved if all states adopt the strategy of, for example, "overfishing for all future rounds if any single state overfishes in any round."[58] This draconian strategy, however, would result to the depletion of the fishery if any single state cheated, or even if a single state mistakenly believed that another state cheated. Recall also that we are talking here about the evolution of a CIL norm, so the states would all have to adopt this strategy, rather than any of the indefinitely large number of alternatives, in order for cooperation to succeed. Probably for these reason, we do not observe such draconian strategies in the real world. Although game theory does not rule out the possibility of n-state cooperation, the assumptions required for such an outcome are quite strong and unrealistic. For this reason, we doubt the utility of n-player prisoner's dilemmas as an explanation for multilateral or "universal" behavioral regularities.[59]

Similar comments apply to n-state coordination games. Examples of n-state coordination problems include the division of the world into time zones and the choice

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57 See infra __.

58 See Michihiro Kandori, Social Norms and Community Enforcement, 59 Rev. Econ. Stud. 63 (1992), on n-player prisoner's dilemmas.

59 This skepticism is shared by others. See, for example, Oye, supra note __, at 7.

of international communication standards. In the latter case, every state wants to facilitate communication between its citizens and citizens of other states, but they must agree on where phone lines hook up, or which part of the spectrum will be used for radio transmissions. Once a particular standard is established, no state gains anything from deviating from it. If everyone is communicating by using one technology, a state gains nothing by switching to another technology while losing the ability to communicate with the other states. To say that states face multilateral coordination problems is not, however, to say that these problems have been, or can be, solved through the evolution of CIL norms. The problem is that the costs of coordination rise exponentially with the number of states. Imagine ten contiguous states that choose between different railroad gauges. If there only two different gauges, and each state chose a gauge independently, the odds that they would all choose the same gauge in the first round is 1 in 2^{10}, or 1 in 1024. In later rounds, one state might, at great cost, switch to the gauge used by another state, but at the same time other states might switch to the gauge of the first state. And if there are more than two gauges -- if there are dozens or hundreds of possibilities -- the odds against coordination are astronomical. Over a very long period of time, it is conceivable that the states might eventually settle on the same gauge, especially if some are economically superior.[60] But it is unlikely, and the states would achieve coordination much more rapidly if they sent representatives to a conference, thrashed out the advantages and disadvantages of the various gauges, and all agreed on one.

When n-state prisoner's dilemmas and coordination games are solved, it is usually by treaty or other international agreement, not by evolution. We discuss this argument below.[61] For now, it is sufficient to understand that our hypothesis is that CIL norms that have apparent universal scope are in fact the result of coincidence of interest, coercion, or the pairwise interactions discussed above.

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60 The model for such an argument would come from evolutionary game theory. See, for example, H. Peyton Young, Individual Strategy and Social Structure (1998). This model shows that as long as parties either experiment or occasionally make errors, and as long as they interact frequently, parties will eventually coordinate on Pareto-optimal actions. "Eventually," however, may be a very long time, and the games they use rely on institutional structure that is lacking with respect to CIL.

61 One can imagine exceptions to this general proposition. Suppose, for example, that two states play a coordination game that establishes a particular gauge. A third state might independently adopt this standard in order to minimize the cost of transportation to the first two states. Other states imitate the first three states. Here, the original bilateral coordination game establishes the focal point to multi-lateral coordination. While this result is possible, it is difficult to achieve, and we have found no example of it in the case studies examined below.

6. A Comparison of the Basic Model and the Traditional View

The traditional perspective would not view a behavioral regularity that arises from any of the four strategic situations outlined above as an example of CIL. To see why, begin with coincidence of interest. In this situation, parties acting independently achieve their best outcomes regardless of the behavior of the other party. The behavioral regularity of nations not sinking enemy ships in this strategic situation is functionally identical to the behavioral regularity of nations not sinking their own ships. There are an infinite number of behavioral regularities of this form that no one would claim constitutes law or custom. None of these behaviors has anything to do with a nation's "sense of legal obligation" that is so central to the traditional account.

Behavioral regularities explained by coercion also would not be viewed as CIL from the traditional perspective. Coercion is also a situation in which nations act in accordance with their private interests rather than in accordance with a norm. The behavioral regularity results from the dominion of the powerful over the weak. While powerful nations have obvious reasons for wanting to characterize this behavioral regularity as law, it is nothing more than the outcome of force. Weak states do not act in the strong state's interest out of a sense of legal obligation. They do so in order to avoid retaliation.

Now consider a behavioral regularity that results from pairwise, bilateral prisoner's dilemmas. This behavior seems more law-like than in the other two situations. This is because in any particular iteration of the game, each nation has a private incentive to cheat. When a nation cooperates in a round, it appears to be complying with a norm because it acts in a fashion not in its immediate self-interest. This looks law-like. For these reasons, the bilateral iterated prisoner's dilemma approaches the traditional conception of CIL more than the other two strategic forms.

But this explanation for an international behavioral regularity differs from the traditional account in important respects. A nation's "compliance" with the cooperative strategy in the bilateral prisoner's dilemma has nothing to do with following a norm from a sense of legal obligation. Nations do not act in accordance with a norm that they feel obliged to follow; they act because it is in their long-term (or medium-term) interest to do so. The norm does not cause the nations' behavior; it reflects their behavior. As a result, behavior in bilateral iterated prisoner's dilemmas will change with variations in the underlying payoffs. Cooperation will rise or fall or break down with changes in technology and environment. Although most traditional scholars acknowledge that states are more likely to violate norms of CIL as the payoff from doing so changes, they appear to insist that the sense of legal obligation will at least put some drag on such

deviations. We, by contrast, insist that the payoffs from cooperation or deviation are the sole determinants of whether states engage in the behavioral regularities that are labeled norms of CIL. This is why we deny the claim that CIL as exogenous influence on states' behavior. In addition, the bilateral prisoner's dilemma cannot generalize to the situation of multilateral cooperation that is such an important part of the traditional account.

Finally, pairwise coordination may emerge spontaneously, or "evolve" into a behavioral regularity, but the resulting norm is not universal. Multilateral coordination that might look like a universal and law-like regularity is, for reasons explained above, highly unlikely to evolve. If it were to evolve, states would not act as they do out of a sense of legal obligation, but rather in order to maximize their payoffs.

B. The Origin and Change of CIL Norms.

Although the basic model of our theory explains how what are called CIL norms can be sustained, it does not explain how they arise and how they change. But a few possibilities follow naturally from the theory.

First, when CIL is used to refer to states whose interests coincide, a change in CIL will occur whenever the states' interests change, and the states' interests will change when the environment changes. For example, states i and j seize each other's fishing vessels at time 0, perhaps because they gain more by engaging in mutual predation than by engaging in unilateral or mutual restraint. At time 1, state k enters the scene and threatens the security of both state i and state j. Now, states i and j have a better use for their navies: defense against state k's navy rather than seizure of fishing vessels. If one defines a CIL norm as any behavioral regularity, then the CIL norm changes (from mutal predation at time 0 to mutal restraint at time 1); if one defines a CIL norm only as behavioral regularities that are "beneficial" in some sense, then the CIL norm arises at time 1 from the disorder that existed at time 0.

Second, when CIL is used to refer to the behavioral regularity that results when one state coerces the other, a change in CIL will again occur whenever the states' interests or relative power change. State i loses its war with state k and also its power to coerce state j, and state j starts seizing i's fishing boats. The old CIL against the seizure of fishing vessel is either replaced by a new norm or by nothing, or disorder gives way to a new norm, again depending on how one defines CIL.

Third, when CIL is used to refer to the behavioral regularity that results when two states confront each other in a bilateral repeated prisoner's dilemma, a more

complicated story is needed. One possibility is that CIL norms of this form can arise when "neutral" behavioral regularities already exist because of coincidence of interest, but payoffs change, creating a conflict of interest. To illustrate, suppose that at time 0 two states fail to seize each other's fishing boats just because their navies have more valuable opportunities. At time 1 these opportunities disappear (e.g., a naval war with other states ends), and consequently the payoff from seizing fishing boats becomes higher (in one round) than the payoff from not doing so. Each country must now decide whether to begin seizing the other's fishing boats.

At this point, the status quo – not seizing fishing boats – is focal, in the sense that each state may recognize it as a possible desirable state of affairs and each state may recognize that the other state may recognize that the first state sees it as a desirable state of affairs. One state might rationally hold off seizing the other state's boats in the hope that the other state recognizes that this is a mutually desirable strategy. Or, one state might not realize that payoffs have changed, and the other state declines to alert the first state to that fact by seizing its fishing boats, given that the other state prefers to preserve the status quo. In either case, one might say that a "mere" behavioral regularity, one based on coincidence of interest, gives way to a norm, where the behavioral regularity reflects coopoeration. In contrast, if the status quo is that of mutual seizure of fishing boats, it will be much more difficult for a pattern of not seizing boats to arise, given that each state knows that if it stops unilaterally, the other state will be tempted to continue seizing boats.[62] The fact that adherence to the status quo always presents itself as a focal point, in contrast to the infinite number of other possible strategy sets, accounts for why CIL norms tend to extend over time once they get started, and may continue to prevail even after they are no longer desirable compared to an alternative (on which see our discussion of treaties below).

It is not the case, however, that a "neutral" behavioral regularity is a necessary predecessor to a CIL norm so understood. Any focal point can stimulate the emergence of the norm. Suppose that state i and state j face the payoffs described by Table 2 above -- a conflict of interest situation -- because of an exogenous change. Prior to this change, each state seized the fishing boats of the other. The change could be, for example, wars involving other countries, which require the attention of each state's navies. Each state still prefers seizing fishing boats to ignoring them in a single round, but both would be better off over the long term if both refrained from seizing the boats. There is no time for a treaty. State i might simply announce, "we will no longer seize the fishing boats from state j, unless state j seizes our fishing boats." If state j knows state i's payoffs, it

62 As noted below, a treaty is more useful for changing the status quo; CIL norms preserve the status quo because the status quo is focal.

might very well believe state i. The joint action of ignoring unless provoked is focal because of the announcement, which is credible because each state knows that this strategy leads to the optimal outcome. Thus, a CIL norm can arise despite the absence of a long historical practice.[63]

Fourth, when CIL norms arise from behavior in coordination games, they can arise and change as a result of trial and error. Recall the example of a coordination game in which armies patrol an area of disputed land that is divided about evenly by a river and a road. (The river and the road cross at various points.) Suppose the soldiers and officers want to avoid conflict, and know that conflict will arise if they patrol overlapping areas. Payoffs can be described as in Table 3, below.

Table 4

	river	road
river	3, 3	0, 0
road	0, 0	3, 3

Both sides do best if they patrol up to the same boundary (either river or road), and come into conflict if they patrol up to a different boundary. If the river is a superior boundary, say, because it keeps opposing soldiers farther apart, then the payoffs in the northwest corner would be higher. Then patrolling along the river is a natural focal point. But even if, as in the table, payoffs for identical actions are equal, one would expect eventual coordination on the same action, albeit perhaps after an initial period of conflict.[64] And once the pattern is established, no state has an incentive to deviate. We present this example as a theoretical possibility, however; we do not think it explains many traditional norms of CIL.

In sum, CIL norms can originate in many ways. If CIL is defined sufficiently broadly, norms of CIL originate and change whenever states' interests or power change. CIL norms can originate by inertia, where the status quo serves as a focal point after payoffs have changed. They can also originate through unilateral action by a state when the state's action and the optimal responses are unambiguous. Finally, they can

63 Contrary to the traditional view of CIL, which requires consistent historical practice as well as *opinio juris*. The traditional view might be falsified by Truman's continental shelf announcement, which, according to conventional wisdom, established a new norm of CIL despite the absence of any relevant historical practice. Two further confusions: (1) it is controversial whether Truman's announcement caused a behavioral change that was sufficiently widespread to count as CIL; and (2) many theorists of CIL now think, because of Truman's announcement, that a consistent historical practice is not a necessary condition of CIL, leaving CIL standing on the single shaky leg of *opinio juris*.

64 See supra note __.

originate when random behavior results in actions that are self-reinforcing. There are no doubt other ways in which norms of CIL originate. Our purpose here is just to show that under our understanding of CIL, the way it originates and changes is no mystery.

C. Casuistry and Reputation.

States make promises and commitments and then try not to violate them in an obvious way. They keep promises, sometimes, and when they do not, rather than admitting that they violate a promise or remaining silent, they insist on justifying their actions by reinterpreting the promise. Much promise-making behavior is related to norms of CIL. For example, after the United States committed itself in its Civil War to a CIL norm of not seizing enemy goods from neutral ships, it violated this commitment, but argued that the goods it seized fit into a contraband exception to the norm, an exception that the United States interpreted so broadly as to leave nothing left of the rule.[65] The question is why the United States engaged in casuistry rather than admitting the breach of the CIL norm or remaining silent.

A complete answer to this question would take us far afield, but we should sketch such an answer, because the phenomenon of state casuistry might be taken as an objection to our thesis that scholars exaggerate the influence of CIL norms on international behavior. After all, if CIL norms do not affect states' behavior, why do states insist that their behavior conforms to the norms of CIL? We will consider two models.

The rogue state model. As is well known, a person who can commit himself to keeping promises has more power than a person who cannot.[66] The first person can find partners in valuable joint endeavors; the second person cannot. The same is true for states. A state can benefit from international cooperation only if other states believe that it will usually keep its promises. States try to keep their promises in order to persuade other states that they are reliable.

To see how this works, imagine a game in which state i makes a promise, state j relies on the promise or declines to rely on it, state i decides whether to breach the promise, and then the game starts over.[67] State i wants state j to rely on the promise,

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65 See infra __.

66 See Schelling, supra note __ at 43-44.

67 This game is known in the literature as a "cheap talk" game because the cost of making a promise is assumed to be zero. The crucial features of the model are that the recipient of the promise does not have perfect information about the promisor's discount factor, and that the promisor and recipient's interests are not too

but state j will rely on the promise only if state i has a reputation for keeping promises — that is, state i is a civilized rather than rogue state. At any given round t, state j might rely on promises made by any state that has kept all (or a major part of) its promises in the past, and not on promises made by a state that has breached many of its past promises. Thus, when state i decides whether to breach a promise, it must take account both of the immediate payoff from breach, and the long-term decline in its reputation if it breaches. There are a variety of equilibria, including the typical "babbling" equilibrium in which no one believes or bothers to make promises,[68] but a plausible equilibrium is one in which state i keeps promises even against immediate interest, and state j believes that state i is civilized. This result does not mean that states always keep promises. The result means that states will keep promises as long as the reputational gains exceed any short-term benefit from breach.

Whether an action is a breach of a promise is not always clear. When ambiguity exists, a state will always claim that it kept a promise rather than admitting a breach. A state's insistence that an action is consistent with a promise is a statement that the state keeps its promises. A state would generally not keep silent or admit that it were breaking a promise, because then it would reveal that it did not keep promises. By insisting that it did keep a promise, a state leaves open the possibility that other states will believe that it did, and thus not revise their beliefs about whether the state is civilized or rogue. The existence of casuistry, then, does not presuppose a harmonious world in which states keep all or even many of their promises. It presupposes only that some states are more likely to keep their promises then other states, and all states would rather be classified in the first group.

The coordination model. Another reason that states keep their promises and try to act consistently is that they receive payoffs when other states successfully rely on their actions. Recall the two-state repeat prisoner's dilemma model of the fishing vessel exemption. Each state refrains from seizing the fishing vessels of the other state, in the expectation that the other state will do the same. As we noted above, this game involves a problem of coordination: what counts as a "seizure" of a fishing vessel. The conventional wisdom is that an illegal seizure occurs when the seized ship is small, plies coastal waters, and carries live fish; it is not illegal to seize a large commercial ship that engages in deep-water fishing, and carries salted fish.

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divergent. See, e.g., David Austen-Smith, Strategic Models of Talk in Political Decision Making, 13 Inter'l Pol. Sci. Rev. 45 (1992).

68 See id.

Recall our example, in which state i's navy seizes a large vessel that plies coastal waters. Perhaps, this form of fishing is new, made possible by technological innovations. To avoid retaliation against its small fishing vessels, state i might say that it has complied with customary internation law, arguing that seizure of the large boat does not count as a "defection" in the repeat prisoner's dilemma. On this interpretation, the reference to a "norm of CIL" is an economical way of saying that one has not cheated. The statement is not irrational; it may indeed have communicative value. If state j wants to maintain the cooperative outcome in the prisoner's dilemma, it may rationally refrain from punishing i, either because it agrees that in the optimal outcome both states can seize large coastal ships, or because it believes that i simply made a mistake. In the latter case, states i and j might argue about what should count as cooperation or cheating, and eventually settle on a compromise.

Both of these models are incomplete. But they capture important elements of reality, and show why the existence of casuistry and argument about CIL does not mean that CIL has independent normative force. Even if CIL norms are the outcomes of prisoner's dilemmas and coordination games, it makes sense for states to claim to comply with CIL, not to admit violating CIL, and to argue about what CIL means. A CIL norm represents states' expectations, which are based on past behavior; arguments about CIL norms are arguments about whether expectations have been met or violated.

More generally, it is hard to see why reputation would play an important role in explaining the evolution of CIL norms. The officials who direct a state's foreign policy must worry about that state's reputation among foreign states, but they also respond to domestic pressures to violate international law that injures domestic interests.[69] Moreover, as Keohane has observed, a reputation for compliance with international law is not necessarily the best means, and certainly not the only means, for accomplishing foreign policy objectives.[70] States can also benefit from reputations for toughness or even for irrationality or unpredictability. Powerful states, like the United States, cannot be punished when they violate international law, so they may do better by violating international law when doing so shows that they will retaliate against threats to national security (for example, Clinton's arguably illegal bombing of Sudan). Weak states with idiosyncratic domestic arrangements, like Iraq, Serbia, or North Korea, may benefit by being unpredictable or irrational. As Schelling has famously shown, one cannot successfully threaten a person if that person is irrational.[71] One might conclude

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69 See Robert Putnam, Diplomacy and Domestic Politics: The Logic of Two-Level Games, 42 Int'l Org. 427 (1988).

70 Robert Keohane, International Relations and International Law: Two Optics, 38 Harv. Int'l L. J. 487 (1997).

71 See Schelling, supra note __.

that all things equal, nations will strive to have a reputation for compliance with international law, but that reputation for compliance will not often be of paramount concern, because all things aren't equal.

D. Customs Among Nations and Individuals

Many people believe customs among individuals -- for example, among merchants -- are quite robust.[72] This belief raises the question why, contrary to what our theory maintains, customs among nations should not also be robust. To answer this question, first one must realize that we do not think that behavioral regularities associated with CIL are not robust. The CIL norms of ambassadorial immunity, for example, are quite powerful, although they do note operate as the standard account presumes.[73] Our claim is that the games we describe account for the emergence and maintenance of customs, whether they are powerful or weak. We think that similar games can also account for the emergence and operation of customs in ordinary life.[74]

That said, we do not think it useful to draw analogies from the individual to the international context. There are too many differences between individual behavior and international behavior. To name a few: individuals feel emotions, internalize norms and are swayed by guilt and shame. No one knows for sure how these factors contribute to the development of social norms, but clearly the process is highly complex.[75] By contrast, states do not have psychologies. If states internalize norms in some sense, as some authors claim, the process is historical and political, not psychological, so analogies to the education of individuals are not useful. In addition, individual action takes place in an environment of dense and overlapping institutions, including families, governments, churches, and workplaces, all of which sanction those who deviate from norms, habituate people to behavior consistent with norms, and have roots that plunge deep into history and (in the case of the family) biology. By contrast, international institutions are extremely weak, have emerged only recently after the most laborious efforts, do not as a general matter provide the means for disciplining states, and still are not suited for disciplining states that violate CIL.

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72 See, for example, Harold J. Berman & Feliz Dassler, The New Law Merchant and the Old: Sources, Content, Legitimacy, in Thomas E. Carbonneau (ed.), Les Mercatoria and Arbitration: A Discussion of the New Law Merchant (1990), at 28, 32; F. De Ly, International Business Law and the Lex Mercatoria (1992). For two skeptical views, see Richard Craswell, Do Trade Customs Exist?, in The Jurisprudential Foundations of Corporate and Commercial Law (Jody Krauss and Steven Walt, eds.) (forthcoming); Lisa Bernstein, The Questionable Empirical Basis of Article Two's Incorporation Strategy (forthcoming, Chicago Law Review).

73 See infra __.

74 See Eric A. Posner, Signals, Symbols, and Social Norms in Politics and the Law, 27 J. Legal Stud. 765 (1998).

75 See, e.g., Jon Elster, The Cement of Society: A Study of Social Order (1989).

States are not people, and so one should not expect states to act like people. The state itself, unlike any single leader, reflects a variety of constituencies, has an indefinitely long life, and is built out of expectations that have deep cultural and historical roots. The international arena is much more violent and unstable than ordinary life. And customs among nations are less common and more fragile than customs among individuals.

E. Summary.

Behavior regularities *do* arise at an international level. We identify four main strategic situations in which behavioral regularities are likely to emerge: coincidence of interest, coercion, bilateral repeat prisoner's dilemma, and bilateral coordination. Each pattern results from nations following their self-interest. Behavioral regularities that reflect these patterns might not be considered remarkable or desirable. But we claim that they – rather than the notion of practices followed from a sense of legal obligation – account for the norms of CIL identified by courts and scholars.[76] The demonstration of this claim is the burden of Part III.

III. Case Studies

In this section, we test the theory developed in Section II against the evidence said to constitute CIL in four areas: neutrality, diplomatic immunity, prize, and maritime jurisdiction. These CIL rules are thought to be robust ones under the traditional account.[77] We argue that the theory explains the evidence more persuasively than the traditional account of CIL.

A. Free Ships, Free Goods

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76 To be more precise, we show below that banal behavioral regularities -- those that arise from coincidence of interest, for example -- are sometimes called CIL by scholars and sometimes not. It appears that scholars are more likely to call such regularities norms of CIL if the regularities appear to be different from those that prevailed at some earlier time, and "better" in an unspecified way. So, for example, no scholar would call the pattern of not sinking one's own ships a norm of CIL, but scholars will argue that a pattern of not seizing another state's fishing vessels is a norm of CIL, even though the two cases are formally identical. The difference appears to be that the implicit baseline in the second case is an undesirable (in the scholar's eye) earlier period in which states seized fishing vessels.

77 Each of these four CIL norms are traditional in the sense that they flourished long before World War II. Since World War II, a new form of CIL has developed -- the new CIL of human rights -- that does not purport to track international behavioral regularities. We examine this new CIL separately, infra __.

The CIL of neutrality purports to govern relations between neutrals and belligerents during times of war. One important neutrality issue is the status of enemy property on neutral ships. Two general principles have competed throughout history to resolve this issue. One principle held that a belligerent could seize enemy goods on a neutral ("friends'") ship. The other principle, captured in the phrase "free ships, free goods" (FSFG), held that all property on a neutral's ship, including enemy property, was immune from seizure. From the seventeenth to the middle of the nineteenth centuries, treaties and state practice reflected both principles, with many variations.[78]

Conventional wisdom among courts and treatise writers views FSFG to have been a well-established rule of CIL after the Declaration of Paris in 1856.[79] The Declaration followed the Crimean War (1852-56), in which France, England, Turkey and Piedmont defeated Russia. One of the Declaration's four principles was the FSFG principle: "The neutral flag covers enemy's goods, *with the exception of contraband.*"[80] All parties to the Crimean War signed the declaration, and during the next fifty years most of the major nations of the world acceded to the it. In addition, the nations that did not accede to the Declaration consistently announced adherence to the FSFG principle at the outset of wars in which they were belligerents. The broad accession to the Declaration, consistent state pronouncements in support of FSFG, and the relative paucity of overt violations of FSFG, are the primary bases for the claim that the FSFG principle was a rule of CIL after 1856.

Our theory of CIL predicts that a universal behavioral regularity tracking FSFG would not likely develop in the face of the conflict of interest it implicates between neutrals and belligerents. In this Section we argue that the historical evidence supports our thesis rather than the conventional wisdom. There was no CIL rule of FSFG in the sense of a universal behavioral regularity of belligerents not seizing enemy property on neutral ships. Academic and judicial claims to the contrary exemplify several errors common to analyses of CIL.

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78 See William Edward Hall, A Treatise on International Law [136-141] (8th ed. 1924).

79 For statements of the conventional wisdom among treatise writers, see, e.g., 7 John Bassett Moore, A Digest of International Law 382 (1906); Theodore Dwight Woolsey, Introduction to the Study of International Law 302 (1902); Phillip Jessup, American Neutrality and International Police 20-23 (1928); Hannis Taylor, A Treatise on International Public Law 723 (1901); C. John Colombos, A Treatise on the Law of Prize 7, 164-67 (1926); many others. Compare Hall, supra note __, at 844 (although " the freedom of enemy's goods in neutral vessels is not yet secured by a unanimous act, or by a usage which is in strictness binding on all nations, there is little probability of reversion to the custom which was at one time universal, and which until lately enjoyed superior authority"). For judicial statements, see, e.g., Marie Glaeser, 1 B. & C. Pr. C. 38 (1914) (dicta).

80 See 4 Encyclopedia of Public International Law at 155-56 (emphasis added).

1. Revisionist Account

Controversies about belligerent and neutral rights played relatively little role in international relations during the period 1856-1914.[81] In part this was because England, the traditional beacon of belligerent rights, did not participate in continental wars during this period.[82] More broadly, the wars fought during the period did not last long, took place mostly on land, and did not require the disruption of sea trade in a way that affected neutral maritime rights.[83] In short, this was not a period that provided many tests for the FSFG principle. It is against this background that we examine whether FSFG was a rule of CIL during the period.

United States Civil War. For its first seventy years, the United States was the world's most ardent defender of neutral rights. This stance was designed to promote U.S. trade and keep the United States out of European entanglements. It included a firm commitment to FSFG, a strict conception of blockade, and a narrow conception of contraband.[84] The United States did not sign the pro-neutral Declaration of Paris because, as a relatively weak naval power, it objected to the Declaration's provision outlawing privateering.[85] But in light of its historic support for FSFG, it was no surprise that, when its Civil War began five years after the Declaration, the United States announced adherence to "free ships, free goods, contraband excepted."[86]

The United States' novel status as a dominant naval belligerent provided the first real test of its commitment to neutrality principles. It failed the test. In the "single incident in which the question of free ships, free goods arose during the Civil war," a United States Prize court apparently rejected the FSFG principle.[87] Much more

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81 John B. Hattendorf, Maritime Conflict, in The Laws of War (ed. Howard, Andreopoulos, and Shulman 1994), at 110; John W. Coogan, The End of Neutrality 10 (1981).

82 Coogan, supra note __, at 25.

83 See Hattendorf, supra note __, at 110; Coogan, supra note __, at 25; Michael Howard, War in European History 95-98 (1976). The description in the text applies to the France-Austria War of 1859, the Sleswig-Holstein War of 1864, the Austro-Italian War of 1866, the Austro-Prussian War of the same year, the Franco-Prussian War of 1870-71, and the Russo-Turkish War of 1878. See Travers Twiss, Belligerent Right on the High Seas Since the Declaration of Paris 4-5 (1884); Egdar Turlington, Neutrality: Its History Economics and Law, The World War Period viii (1936).

84 See 1 Carlton Savage, Policy of the United States Toward Maritime Commerce in War 1-82 (1934).

85 See President Franklin Pierce, Annual Message to Congress, 2 December 1856.

86 See U.S. Dipl. Correspondence 1861, at 28, 127, 175, 235. For the Confederate view, see State Papers, vol. 51, at 257, and Congressional Resolution on August 13, 1861.

87 Stuart Bernath, Squall Across the Atlantic: American Civil War Prize Cases and Diplomacy 7 (1970).

insidious to the FSFG principle than this overt violation was the United States' widespread disruption of neutral ships carrying enemy goods under the guise of an unprecedentedly broad conception of blockade and contraband. The expansion of these collateral doctrines illustrates the emptiness of the FSFG principle and, more broadly, the CIL of neutrality.

At the outset of the Civil War, Lincoln declared a blockade of the entire coastline of the Confederate states. A blockade justified a belligerent in seizing all ships -- including neutral ships -- attempting to violate the blockade. The traditional United States position was that blockades were binding only if they were "effective" in the sense of preventing access to the enemy's coast.[88] Anything short of this strict definition of effective blockade would allow a belligerent to declare a paper blockade and "assert a general right to capture any ship bound to his enemy," thereby undermining FSFG and other neutral rights.[89] American insistence on the principle of effective blockades was one reason for the War of 1812.[90]

When Lincoln declared the blockade of the Confederacy, one union ship covered each 66 miles of confederate coast, and nine out of ten vessels successfully breached the blockade; during the war five of six blockade runners made it through.[91] This porous blockade clearly would have been deemed ineffective under prior U.S. policy.[92] But Lincoln and his advisors changed the United States' prior stance, arguing that a blockade did not have to be totally effective to be legally effective.[93] The Supreme Court, sitting as a Prize court, later ratified Lincoln's view as consistent with CIL.[94] England accepted the blockade as legal, because it supported its long-term goal to expand the power of the blockade, and because the blockade was easy to circumvent in any event.[95]

The United States' practice with respect to effective blockade undermined the force of the FSFG principle, because it justified the United States in preying on neutral vessels anywhere at sea that were bound to a blockaded port. By itself, this practice did not

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88 See Moore, supra note __, at § 1269; Savage, supra note __, at 25, 38, 45.

89 Jessup, supra note __, at 24

90 Id.

91 Frank L. Owlsey, America and Freedom of the Seas, 1861-1865, in Essays in Honor of William Dodd (1935), at 197, 201; see also Bernath, supra note __, at 11.

92 Coogan, supra note __, at 22; Owsley, supra note __, at 197-203.

93 Coogan, supra note __, at 22; Savage, supra note __, at 459-70; Bernath, supra note __, at 11-14, 27-33.

94 The Springbok, 72 U.S. 1 (1866); The Peterhoff, 72 U.S. 28 (1866); Moore, supra note __, at 708-15.

95 Bernath, supra note __, at 14.

completely undermine FSFG, for a neutral could in theory take enemy property to a neutral port for subsequent shipment to the Confederacy. But the United States closed this loophole too. In the early nineteenth century, it had vigorously protested the English practice of seizing American ships sailing between two neutral ports on the ground that the goods were on a "continuous voyage" to a blockaded port.[96] In the Civil War, it reversed course and began to capture neutral vessels sailing between neutral ports if the ultimate destination of the goods on board the ship were to the blockaded confederacy.[97] In so doing, the United States engaged in liberal presumptions about the goods' ultimate destination that expanded the concept of "continuous voyage" beyond even England's broad interpretation. The Supreme Court, sitting as a Prize court applying CIL, upheld this broad conception too.[98]

The United States' liberal policy concerning blockade and continuous voyage rendered the FSFG principle otiose in practice.[99] This policy was guided by expediency, not principle. The goal was to be as aggressive as possible in shutting down trade with the confederacy without provoking the British to enter the War on the side of the South. In pursuing this goal, some United States officials (such as Secretary of State William Henry Seward) were indifferent to CIL or tried to manipulate its ostensible requirements for strategic purposes; other officials (such as Secretary of Navy Gideon Welles) were ignorant or disdainful of CIL.[100] There is no evidence that the FSFG rule to which the United States announced adherence at the outset of the war had any influence on the government's decision-making process, and it was belied by its practice.

Following the American Civil War other nations also expanded collateral maritime doctrines to water down the FSFG principle in practice.[101] For example, in the Franco-

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96 Id. at 66-67.

97 James P. Baxter, The British Government and Neutral Rights, 1861-1865, 34 American Historical Review 9 (1928); James P. Baxter, Some British Opinions as to Neutral Rights, 1861-1865, 23 Am. J. Int'l L. 517 (1929).

98 See The Bermuda, 3 Wall. 514 (1865); The Springbok, 72 U.S. 1 (1866); The Peterhoff, 72 U.S. 28 (1866); Circassian, 2 Wall. 135 (1864); see Baty, supra note __, at 13-16.

99 See Arnold-Forster, The New Freedom of the Seas 31-32 (1942) (By [an] irony of fate, the first country to contribute to [the] stultification of the Free Ships rule was the very State which had been the rule's most consistent champion — the United States. . . . Thus the United States began the process of stretching the rules of contraband and blockade, and thereby walking through the free ships rule.")

100 See Mary Martinice O'Rourke, The Diplomacy of William Seward During the Civil War: His Policies as Related to International Law (Phd diss. 1953); Owlsey, supra note __, at 194-256; Bernath, supra note __, at 12-15.

101 It is worth mentioning how subsequent actions by the United States are in tension with the notion that the FSFG had bite as a rule of CIL. In several bilateral treaties made after the Declaration, the United States recognized that the FSFG principle is "permanent and immutable," but the contracting parties agreed to apply the principle only to the commerce and navigation of nations that "consent and adopt" to the permanency and immutability of "free

Chinese conflict of 1885, the French embraced a broad doctrine of continuous voyage and contraband to seize a ship carrying rice between neutral ports.[102] Japan engaged in a similar acts during the Sino-Japanese War of 1894, as did the Italians in their 1896 war with Abyssinia.[103]

Spanish-American War. In the next major war, the Spanish-American War (1898), the United States and Spain engaged each other primarily through naval power. Although neither nation was at the time a signatory to the Declaration of Paris, both nations announced adherence to its principles — including FSFG — at the outset of the war.[104] During the war Spain did not disrupt neutral ships that contained United States property. And despite controversial blockades of a few Spanish ports and a mildly expansive contraband list,[105] the United States enforced its belligerent rights in a very narrow fashion.[106]

One could interpret these events as support for the FSFG principle. But closer inspection reveals that neither country had an interest in disrupting neutral commerce during the war. The war lasted barely three months. During this time, Spain lacked the naval capacity to prey on neutral ships. Its naval force in the Philippines was destroyed less than two weeks after the war began and in any event never presented a threat to neutral commerce.[107] The Spanish Navy in the Atlantic might have presented a greater threat to neutral commerce because of its proximity to the United States. But it consisted of only "four armored cruisers and a few torpedo boats and destroyers" that were "inadequately equipped, out of repair, and wretchedly manned."[108] And in any event the Spanish naval forces were blockaded in Santiago Harbor in Cuba before they

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ships, free goods." See Moore, supra note __, at 402. Similarly, several treaties after the Declaration acknowledged the FSFG principle, but only in regard to the property of enemies who recognized it. Id. The United States' conditional assent to FSFG on various conditions of reciprocity suggest that the rule was not binding on the U.S. as a matter of CIL.

102 J.H.W. Verzijl, International Law in Historical Perspective, The Law of Maritime Prize 367 (1992).

103 Id. at 367-88.

104 U.S. Presidential Proclamation, April 26, 1898; Spanish Royal Decree, April 23, 1989.

105 Elbert Benton, International Law and Diplomacy of the Spanish-American War 202-04 (1908).

106 Coogan, supra note __, at 25.

107 David F. Trask, The War With Spain in 1898 95-107 (1981); Harold Sprout and Margaret Sprout, The Rise of American Naval Power 1776-1918, at 231 (1966).

108 Id. at 231-32; see also United States Naval Academy, American Sea Power Since 1775 (1945), at 221 (describing the corruption in service supply, the lack of training and engineering competence, [and] the despondent inertia which . . . vitiated the Spanish marine".

were destroyed.[109] Spain declined to prey on neutral commerce in the war not because of international law, but rather because it lacked the naval capacity to do so.

The United States had different reasons for not preying on neutral commerce during the three month war. There were few Spanish goods on neutral ships for it to capture,[110] and the United States' overwhelming military and strategic superiority precluded any strategic need to prey on neutral ships. Because the United States had no military interest in disrupting neutral commerce, it could -- unlike during the Civil War -- take a position in line with its long-term commercial interests. As a traditional neutral that was heavily dependent on maritime commerce, the United States had (with the notable exception of the Civil War) long advocated complete immunity of private property at sea.[111] President McKinley's 1898 Annual Message to Congress included a proposal for an international agreement to achieve this end, and the United States strongly urged the Hague Conference of 1899 to consider this proposal.[112] Pursuit of this long-term goal required the United States to refrain, if possible, from an aggressive assertion of belligerent rights in the war with Spain -- a posture that events proved the United States could afford to maintain.

Boer War. The Anglo-Boer War (1899-1904) between Britain and the two Boer republics (Transvaal and the Orange Free State) did not at first portend a dispute over maritime rights. The Boer republics had no navy, no merchant ships, and no coast to attack or blockade. And the British were disinclined to attack neutral trade because they believed that the Boers did not depend on it and because they wanted to avoid reprisals from neutrals. For these reasons among others, the British announced at the War's outset that they would not search or detain any neutral ship.[113]

The British attitude toward neutrals changed following early military setbacks and reports that the Boers were receiving supplies through Lourenco Marques, the neutral port for Portugese Mozambique that was forty miles by rail to the Transvaal frontier. For several months in 1899-1900, the British Navy seized American and German ships sailing from neutral ports to Lourenco Marques. In so doing, the British government acted on the basis of military expediency, and ignored legal advice that such seizures

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109 Clark Reynolds, Command of the Sea: The History and Strategy of Maritime Empires 418 (1974); American Sea Power, supra, at 230-232; Trask, supra note __, at 257-69.

110 Thomas Bowles, The Declaration of Paris of 1856 (1900), at 205

111 See 7 Moore, supra note __, at 461-473; 2 Charles Henry Hyde, International Law, Chiefly as Interpreted and Applied by the United States 529-32 (1922).

112 See Annual Message, December 5, 1989, in 1 Savage, supra note __, at 490-91; Coogan, supra note __, at 26-29.

113 Coogan, supra note __, at 30-31.

would violate CIL and the manual of the English Admiralty.[114] The British government justified the seizures on the grounds that the ships carried contraband goods and that there was a "reasonable ground" that the ultimate destination of the goods was to the Boer republics.[115] The British conception of contraband goods was unprecedentedly broad, including foodstuffs.[116] So too was its use of the continuous voyage doctrine.[117]

The British expansion of the contraband and continuous voyage doctrines vitiated the FSFG principle just as the United States had done during the Civil War. In contrast to the British response to the United States practice during the Civil War, however, the British practice during the Boer War caused the United States and Germany to threaten retaliation.[118] In response, Britain defended the legality of its actions, but it finally stopped preying on neutral commerce and it compensated some of the affected German commercial interests.[119]

The resolution of the maritime rights disputes in the Boer war resulted in a behavioral regularity consistent with the FSFG principle. But Britain did not obey the FSFG principle out of a "sense of legal obligation." Britain began the war with no interest in preying on neutral shipping. When its strategic needs changed it reversed this policy even though doing so violated the ostensible requirements of CIL. It then retreated in the face of neutral threats which negated any gains from interrupting neutral trade.

Russo-Japanese War. During the Russo-Japanese War (1904-1905), Russia took an even more aggressive stance towards enemy property on neutral ships than the United States during its Civil War and Britain during the Boer War. Both Russia and Japan proclaimed adherence to the FSFG principle at the outset of the war. But Russia also claimed the right to seize and sink neutral ships carrying contraband, and its contraband list was unprecedentedly broad, including food, fuel, and other general use items.[120] Pursuant to these rules, the Russian navy harassed, seized, and sometimes sank American, German, and British ships, many of which contained only foodstuffs

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114 For an excellent account, see Coogan, supra note __, at 30-42.

115 See Robert Granville Campbell, Neutral Rights and Obligations in the Anglo-Boer War, in 26 Johns Hopkins University Studies in Historical and Political Science (1908).

116 Id at 80-81.

117 Id. at 83-85, 96-97.

118 See Coogan, supra note __, at 35-40.

119 See Campbell, supra note __, at 111-12; Coogan, supra note __, at 38-42.

120 Coogan, supra note __, at 44.

and were not bound for a Japanese port.[121] In practice enemy property on neutral ships received no protection.[122]

Russian policy and actions provoked threats of retaliation from Britain and especially the United States.[123] The Russian foreign ministry came to believe that "Russia stood to lose far more by provoking Britain and the United States than it could possibly gain by seizing a few cargoes of food."[124] Accordingly, as Britain had done during the Boer War, Russia maintained the legality of its policies but backed away from its aggressive anti-neutral actions. Once again, the Russian action is best understood as bowing to threats of retaliation in the pursuit of short term interests rather than compliance out of a sense of legal obligation to a rule of CIL.

World War I. The absence of a customary practice concerning the rights of maritime neutrals that was so evident in the U.S Civil War, the Boer War, and the Russo-Japanese War was confirmed by the events of the Second Hague Peace Conference of 1907 and the London Conference of 1909-1910. The Hague Conference was unable to reach agreement about the content of maritime doctrines -- contraband, blockade, continuous voyage, and the like -- that belligerents had invoked to skirt the FSFG rule.[125] The Conference also split on the American proposal to immunize all private property from capture during war. When delegates from the maritime powers met at the London Conference in 1908-09, they were able to reach agreement on a substantive law of maritime rights, including concrete definitions concerning contraband, continuous voyage, and blockade. But many governments (most notably England) rejected the agreement, and no country ever ratified it.

World War I began a few years later. It is well known that the war destroyed any pretense of a law of maritime rights. Contraband lists expanded to include any item unless there was proof that it was not destined for an enemy.[126] Blockades were

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121 See F.E. Smith and N.W.Sibley, International Law as Interpreted During the Russo-Japanese War (1905); Sakuye Takashi, International Law Applied to the Russo-Japanese War (1908).

122 As one commentator on the Russo-Japonese War stated: "the entire absence of any definition of contraband in the Declaration has left neutral commerce as exposed to the encroachment of belligerent rights as before 1856. Goods which were formerly seized in neutral vessels because they were the property of enemy subjects are now liable to seizure under the pretext that they are contraband." Smith and Sibley, supra note __,at 227.

123 See Coogan, supra note __, at 48-50.

124 Id. at 50.

125 See C. John Colombos, The International Law of the Sea (1962). The Conference did agree to establish an international prize court, but this court never got off the ground. Id. at 779-80.

126 Jessup, supra note __, at 37; Turlington, supra note __, at 8-33.

clearly ineffective and were extended to neutral ports.[127] Blacklists, embargoes, and mining further disrupted neutral commerce.[128] In short, all property on neutral ships, and especially enemy property, was subject to seizure.[129] Scholars like to say that the belligerents violated the norms of CIL; it is more accurate to say that behavioral regularities that emerged during prior wars disappeared in World War I, no doubt because of changes in technology, stakes, and interests.

2. Significance

The FSFG principle illustrates how our theory explains the behaviors associated with CIL better than the traditional conception. It better explains the patterns of behavior consistent with the ostensible CIL norm; it better explains deviations from the norm and related puzzles; and it reveals a variety of errors of generalization typical of CIL analysis.

In some of the wars during the period belligerents and neutrals achieved a behavioral equilibrium that was consistent with the FSFG rule. The best explanation for these equilibria is not, however, adherence to an exogenous CIL norm from a sense of legal obligation. In every war, a belligerent's decision whether, and to what extent, to forego capturing enemy property on neutral ships was the product of a careful assessment of its (usually short-term) interests. Belligerents sometimes gained little from interrupting neutral trade and thus did not try. This "coincidence of interest" situation was the position of England at the outset of the Boer War and the United States throughout the Spanish-American War. Other times belligerents gained much from capturing enemy goods on neutral ships but lost more from neutral retaliation. This "coercion" situation was the position of England later in the Boer War and Russia late in its war with Japan. In those cases in which the belligerent's desire to disrupt enemy property on neutral ships was not checked by a superior threat of neutral

127 Jessup, supra note __, at 38-41; Turlington, supra note __, at 34-66

128 Jessup, supra note __, at 42-50; Turlington, supra note __, at 34-99.

129 Some prize courts stated during and just after the war that FSFG was a rule CIL. See, e.g., Marie Glaeser, 1 B. & C. Pr. C. 38 (1914) (dicta). But most of these cases read FSFG so narrowly as to render it practically a nullity. For example, the principle was limited to private enemy property; a belligerent could recover public enemy property on a neutral ship. See John Colombus, A Treatise on the Law of Prize (2d ed. 1940), at 164. Similarly, FSFG did not prevent a belligerent from capturing enemy property on one of its own merchant ships, see id. at 163 n. 7, or from capturing enemy cargo loaded from an enemy to a neutral ship, id. at 162, or unloaded from a neutral ship, see The Batavier ii, 2 B. & C. P.C. 432 (1917). In addition, Prize courts did not make captors liable for the destruction of goods on board neutral ships, id. at 164. By the middle of the war, even the pretense of judicial adherence to FSFG had evaporated. See Jessup, supra note __.

retaliation, the ostensible FSFG rule did nothing to prevent them from doing so. This too can be seen as a coincidence of interest.

The FSFG example also illustrates many changes in the actual practice of nations that are consistent with the view that international behavior is a function of nations' changing interests and relative power, but that make no sense under the view that nations abide by CIL from a sense of obligation. For example, state practice and the rationalization of practice with regard to the status of enemy property on neutral ships changed in important ways from war to war. In addition, nations changed their views about the content of CIL in accordance with changing interests in particular contexts. Thus, for example, the United States asserted neutral rights liberally throughout the nineteenth except for the one time that it was a belligerent (its Civil War), when it asserted unprecedentedly broad belligerent rights. Similarly, England asserted broad belligerent rights in the Boer War but protested when Russia asserted similar rights in the Russo-Japanese War just a few years later. Germany vehemently protested the British anti-neutral practices during the Boer War but engaged in much more aggressive anti-neutral acts a little more than ten years later.

In addition, the FSFG example illustrates several common fallacies of generalization among international law theorists. Scholars base the claim that FSFG was a rule of CIL during the period following the Crimean War on three types of evidence: widespread accession to the Declaration of Paris, verbal commitments to FSFG at the outset of wars and in other diplomatic contexts, and the relative paucity of overt violations of the rule. For several reasons, this evidence does not demonstrate an international behavioral regularity followed from a sense of obligation.

The first error is to infer a law-like behavioral regularity from verbal commitments to a rule of CIL. We have seen that there was not in fact a behavioral regularity of not seizing enemy property on neutral ships during the period in question. Throughout the period belligerents invoked and expanded a variety of related maritime rights in a way that enabled them to continue preying on enemy property on neutral ships in much the same fashion (and probably more aggressively) than the pre-1856 period. As one commentator observed:

> [W]hile granting that the letter of the law [of "free ships, free goods"] has been strictly observed, the conclusion that is forced upon the student of recent practice is that, through unwarranted extension of belligerent rights based upon related portions of the law of maritime warfare, the rule that private enemy property is free when transported in neutral ships very nearly approaches

nullity, and is only preserved in some semblance of vigor by the influence of neutral opposition to the devices of belligerents rendering it a dead letter.[130]

By focusing on pronouncements and the relative paucity of "direct" violations of the FSFG principle, commentators have overlooked the many ways in which the practice of seizing enemy goods on neutral ships continued unabated.

A second error, an error of induction, is to view coincidence of interest situations as an example of norm-following. For example, in the Spanish-American War neither belligerent had an enforceable interest in seizing enemy property on neutral ships. The nations were not abiding by a CIL norm; they simply lacked either the means or the interest in seizing the enemy property. A third error is the belief that the behavioral regularities associated with an ostensible CIL rule possess a unitary underlying logic. The FSFG example shows that such behavioral regularities might have multiple, and quite different, explanations. Nations sometimes refrained from seizing enemy property on neutral ships because that lacked any affirmative interest in doing so, and other times because of fear of neutral retaliation.

A fourth error is the belief that what might be called "cooperation" in certain maritime contexts generalizes to all maritime contexts. As the Boer War and Russo-Japanese Wars demonstrate, if a powerful neutral makes a credible threat of retaliation, the belligerent might refrain from seizing neutral ships. But such belligerent acts are a function of war-specific allocations of power and other contingent factors that inform belligerent and neutral payoff structures. These acts are the product of these contingent factors rather than compliance with an independent legal norm. There is no in theory reason to believe that payoff structures that result in this behavioral regularity in some wars will be present in all, or even most, wars. The FSFG example bears out this point in practice.

There is a final aspect of the FSFG story worth noting. Although state practice during the period cannot support the claim that FSFG was a rule of CIL, it is nonetheless striking that every belligerent during the post-1856 period announced adherence to FSFG as a principle of international law, and every nation attempted to justify departures from this principle as consistent with international law. We sketched above how claims of adherence to international law can function as attempts either to signal that a nation is not a rogue state or to alert partners in a coordination game that

130 Harold Scott Quigley, The Immunity of Private Property at Sea, 11 Am. J. Int'l L. 22, 26-27 (1917). For similar assessments, see Benton, supra note __, at 196; H.J. Randall, History of Contraband of War, 24 Law Q. Rev. 449, 464 (1908); Colombos, supra note __, at xiii; Arnold-Forster, supra note __, at 3; Baty, International Law in South Africa 12 (1900).

expectations have changed.[131] Belligerents want neutrals to believe that they can be trusted, so they will not admit that they break their commitments to abide by international norms. When circumstances change and states no longer believe that they profitably abide by their earlier commitments, they announce a reinterpretation of the these commitments rather than admit that they have violated them, in order to avoid the inference that they will not honor other commitments they have made along other dimensions of interaction.

B. Ambassadorial Immunity

Commentators have long agreed that CIL requires states to protect foreign ambassadors and related personnel.[132] This requirement divides into two main components. First, the host state may not harm foreign diplomatic personnel, either through civil or criminal process, or through extra-legal means. Second, the host state must protect foreign diplomatic personnel from threats posed by citizens of the host state. Although these requirements have limitations, and they have fluctuated to some extent over the years, the CIL of ambassadorial immunity -- now codified in the Vienna Convention[133] -- has always been considered one of the most robust norms of CIL. It is therefore a suitable test case for our theory of CIL.

Our theory holds that a nation would grant ambassadorial immunity only when in its private interest to do so, or in bilateral, repeat games in which payoffs from cooperation relative to defection are relatively high, discount rates are relatively low, and conduct is sufficiently observable. In this Section we first explain why behavioral regularities concerning ambassadorial immunity are consistent with the theory. We then offer explanations for various deviations from the behavioral regularity of protecting ambassadors that are inexplicable (except, is some cases, as "violations") under the traditional account.

1. Revisionist Account

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131 See supra __.

132 See, e.g., Clifton E. Wilson, Diplomatic Privileges and Immunities 1 (1967); Montel Ogdon, Juridical Bases of Diplomatic Immunity: A Study in Origin, Growth and Purpose of Law 8-20 (1936); John Westlake, 1 International Law 276 (1910); L. Oppenheim, International Law, Vol. 1, Peace (ed. H. Lauterpacht)(8th ed. 1955), at 790; Ernest Satow, A Guide to Diplomatic Practice (Bland ed. 1957), at 181 (Charles G. Fenwick, International Law (3d ed. 1948), at 469; Theodore Dwight Woolsey, Introduction to the Study of International Law (6th ed 1898), at 134.

133 Article 31 of the Vienna Convention provides: "A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving state."

A nation can either protect or not protect diplomats. Ambassadorial immunity is a behavioral regularity of nations protecting diplomats. The regularity is remarkable because there are an enormous number of diplomatic encounters, and the instances of abuse are rare. Diplomatic immunity from criminal jurisdiction appears to be a particularly robust norm, for diplomats do commit crimes with some regularity, and immunity from criminal jurisdiction is almost always granted.[134]

There are several explanations for this behavioral regularity. One is coincidence of interest. A host state will not harm a diplomat if the immediate payoff from protecting him is less than the payoff from not protecting him. Whenever a host state harasses, arrests, or expels a diplomat for any reason, it suffers an immediate cost, namely, the breakdown in the channels of communication with the sending state. For this reason alone, if a diplomat has not outraged the local population or engaged in espionage or other activities that threaten national security, the immediate payoff from harassing, arresting, or expelling will likely be less than the payoff that results from maintaining the channels of communication. A behavioral regularity that exemplifies this logic would be a mere coincidence of interest.

This theory does not fully explain states' treatment of diplomatic personnel. It often happens that the payoff from not protecting diplomats is very high. Iranians mobbed the United States embassy in 1979 in part because they believed that the United States was responsible for the Shah's regime. If the Iranian government had restrained the mob, it would have suffered a decline in its popularity among citizens. The local population can be similarly aroused when diplomatic personnel violate local criminal laws. Members of the British public were upset when an American ambassador was not prosecuted after shooting to death an intruder.[135] The American Congress has several times considered bills designed to restrict immunity for certain crimes like drunk driving.[136] More recently, the American public was aroused when a Georgian diplomat ran over and killed an American teenager in New York while driving under the influence of alcohol.[137] There are many similar examples. In all of these cases,

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134 For example, between August 1982 and February 1988, there were 147 alleged criminal cases involving diplomats, none of whom was prosecuted. See U.S. Department of State, Study and Report Concerning the Status of Individuals with Respect to Diplomatic Immunity in the United States, prepared in pursuance of the Foreign Relations Authorization Act, Fiscal Years 1988-89, PL 100-204, Section 137 (presented to congress on 2-18-88). Similarly, from Oct. 1, 1954, to Sept. 30, 1955, there were 93 criminal cases against diplomatic personnel in England and Wales that were not pursued because of diplomatic immunity. Wilson, supra note __, at 79 n. 6.

135 See Wilson, supra note __, at 88.

136 See Wilson, supra note __, at 37.

137 See Knab v. Republic of Georgia, 1998 U.S. Dist. LEXIS 8820 (D.D.C. May 29, 1998).

governments responsive to popular agitation would receive a relatively high short-term payoff by either seizing or allowing others to seize diplomatic personnel.

This possibility suggests that the CIL of diplomatic immunity might better be modeled as an iterated prisoner's dilemma. Suppose that state i has the following payoffs (see Table 3). It receives 10 if its ambassador can operate unharassed in state j while it harasses state j's ambassador in state i; 6 if its ambassador operates unharassed while state j's ambassador also enjoys security in state i; 2 if both ambassadors are harassed or withdrawn; and 0 if state i's ambassador is harassed while state j's ambassador is not harassed. Suppose further that state j has symmetrical payoffs. These payoffs might occur during times of tension. Each state benefits if its ambassador enjoys security because that ambassador can send and receive diplomatic messages and engage in espionage. Each state benefits if it can successfully harass or harm the other state's ambassador, thereby preventing that ambassador from engaging in espionage without interfering with communication. But if both states harass the ambassador of the other, then communication breaks down, and the suboptimal equilibrium results.

Table 5

	harass	protect
harass	2, 2	10, 0
protect	0, 10	6, 6

In these circumstances, diplomatic immunity is a prisoner's dilemma, and can be solved only if the two states expect to have repeat dealings with each other and the other conditions of two-state cooperation are met. They conditions are usually met. Relations between two states are almost always indefinitely long games. The benefits from diplomatic communication are high, but these benefits are always spread out over the long term. Short-term deviations may be tempting because of local or temporary political circumstances, but are unlikely to exceed the (undiscounted) long-term benefit of communication. When a diplomat from state j commits a crime, for example, state i has an interest in enforcing its criminal laws against the diplomat to preserve the integrity of the criminal law and prevent local unrest. But if i prosecutes the diplomat, it suffers more than just a breakdown in communication with j, for j has a hostage in the person of i's ambassador and may retaliate by harming i's ambassador.[138] These adverse consequences from enforcing local criminal law against j's diplomat mean that i

138 See, for example, Wilson, supra note __, at 56 (following Brazilian mob attack on Russian diplomats, Soviets held Brazilian "ambassador under surveillance as hostage until safe departure of Russian diplomats from Brazil was assured").

will receive a larger payoff from non-enforcement, if j refrains in similar circumstances. A diplomat may impose costs on a host state whether he commits a crime or not; the host state refrains from punishing him because it wants to maintain its own diplomat in the foreign state. The cooperative strategy (immunity) has a clear all-or-nothing quality that is relatively easy to monitor; indeed, the all-or-nothing quality of state's responses are probably intended to avoid ambiguity. Each nation's response to a violation of the immunity rule (retaliate) is clear and easy to enforce.[139] And nations that successfully maintain long-term diplomatic relations are always relatively civilized and stable states, rather than rogue or revolutionary states, consistent with the assumption that cooperation can be achieved only when parties have low discount rates.

At first glance the existence of the relatively robust ambassadorial immunity rule appears to be a counterexample to our claim that robust multinational behavioral regularities are not likely to exist.[140] In fact, it shows the opposite. It illustrates our claim that a universal behavioral regularity may develop as an amalgam of independent, bilateral repeat prisoner's dilemmas. The logic of ambassadorial immunity -- sending and receiving diplomats, the monitoring of diplomatic activities, the breakdown in communication and the retaliation that follow harm to a diplomat, and so forth -- takes place within, and is fully explained by, bilateral relations. The fact that states X and Y have diplomatic relations with *n* other states is irrelevant; relations with third countries do no work in explaining the diplomatic immunity rule. Far from being a multilateral norm, and far from being a manifestation of states' sense of legal obligation (whatever that means), ambassadorial immunity can reflect equilibria that arise independently from strategic behavior in pair-wise interactions among all states.

Abundant evidence supports this claim. When diplomatic immunity is denied or postponed, the diplomat's country often retaliates, but third countries do not. To take one of scores of similar examples, in 1961 the Soviet Union expelled the Dutch ambassador in protest of the Dutch police's alleged mishandling of the Soviet ambassador, but no other nations retaliated.[141] Only in egregious cases do otherwise-

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139 A perhaps more accurate game-theoretic representation of diplomatic immunity game is the Battle of the Sexes. If state X knows that state Y will harm X's diplomat, X will want to protect Y's diplomat in order to keep communications open. If state Y knows that state X will harm Y's diplomat, Y will want to protect X's diplomat in order to keep communications open. Both of these outcomes are equilibria, but the more plausible outcome is a mixed strategy equilibrium in which each state harms foreign diplomats with some probability p, and protects them with probability 1-p. In other words, one would observe occasional but not constant violations of diplomatic immunity, depending on the relative payoffs from violation and protection. To keep our analysis consistent with our analysis in earlier sections, we ignore these complications without, we think, sacrificing much accuracy. For a discussion of the Battle of the Sexes game, see, e.g., Morrow, supra note __.

140 See supra __

141 See Wilson, supra note __, at 68.

uninvolved states retaliate against another state for violating the norms of diplomatic immunity, and even in these cases retaliation is neither universal nor robust. Consider the unprecedented Iranian invasion of the American embassy. No country pulled its embassy from Iran. Only the United States' closest allies -- the European Community nations and Japan -- imposed economic sanctions. They did so late, grudgingly, and in response to enormous pressure from the United States.[142] The sanctions they finally did impose were generally acknowledged to be ineffectual, empty gestures.[143]

2. Explaining Puzzles and Deviations

We have explained how our theory accounts for a general behavioral regularity of states protecting diplomats. But contrary to the traditional account, our theory does not predict equilibrium behavior to be identical among all states. It is one thing to say, at a high level of generality, that nations respect diplomatic immunity and that equilibria resemble each other. This is not surprising because the same basic strategic game is being played by states in the same basic position. States exchange ambassadors for the communicative benefits, they are sometimes tempted to prosecute foreign ambassadors or to fail to protect them from harm, they risk a breakdown in communications and retaliation against their ambassador, and they hold foreign ambassadors as hostages. But our theory predicts that details of behavior will vary in important respects when the relationships among states vary. The evidence is too sketchy to confirm or falsify these hypotheses with rigor. But it is highly suggestive.[144]

The first claim is that rogue states violate the norms of diplomatic immunity more often than civilized states do. When states have unstable political institutions, their leaders must weigh short-term payoffs more heavily than leaders in other states do. As a result, they are more willing to risk retaliation in order to obtain any payoffs from violating diplomatic immunity in the present. Available empirical evidence shows that developing countries, countries in the throes of revolution, and countries controlled by unstable dictators violate diplomatic immunity more frequently than civilized states do.[145] The Iran hostage crisis is a prominent example, but so too are the 1967 attack on the British embassy by supporters of the Cultural Revolution in China, and the 1958

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142 See How to Be a Good Ally Without Really Putting Oneself Out, Economist, April 19, 1980; Running Out of Sanctions, Newsweek, April 28, 1980.

143 See Iranian Sanctions: Scarcely Worth Bothering to Bust, Economist, June 7, 1980; The Sanctions Mouse that Squeaked, The Economist, May 24, 1980; A Limp Set of Sanctions on Iran, Business Week, June 2, 1980.

144 Notice that a violation of diplomatic immunity will not necessarily be overt. If one state credibly threatens to violate diplomatic immunity, a second state may grant a waiver in order to avoid an open breach.

145 See Wilson, supra note __, at 50-51; McClanahan, supra note __, at 144.

Iraqi military coup that resulted in the burning of the British embassy.[146] Relatedly, a survey of U.S. Foreign Service Officers indicated that "the extent of protection in so-called 'civilized countries' was greater than in newly emerging nations," and that the in these emerging nations, "the degree of protection apparently sometimes coincided with the level of political stability and the role of the political leader."[147] There are many similar examples.[148]

The second claim is that states are more likely to violate diplomatic immunity when stakes change, so that the benefit from violating immunity (for example, quelling a popular outcry) are very high or the benefit from respecting immunity (maintaining communication with a state) are low. Several observations are consistent with this claim. Perhaps the most frequent denial of diplomatic immunity occurs when the diplomat does something in the host state that threatens its national security.[149] To take two examples: The British seized Swedish Ambassador Count Gyllenborg in 1917 in connection with a plot to overthrow George I;[150] and in 1914, the United States arrested and seized the papers of an attache of the German embassy who was conspiring against the neutrality of the United States.[151] When a nation's security is threatened, it receives a heightened payoff from compromising diplomatic immunity. Another example is the well-documented mistreatment of diplomats behind the iron curtain at the onset of the Cold War.[152] The former communist states were closed societies that often arrested, detained, and harassed diplomats -- in violation of accepted immunity principles -- in order to deter their travel, inquiries, and photography within the host state.[153] Wilson refers to this trend as a "retrogression" from traditional practice.[154] The retrogression makes sense: the communist states suffered more domestically than non-communist states from enforcement of the traditional CIL of diplomatic immunity, and thus enforced it less.

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146 McClanahan, supra note __, at 145, 181; see also id. at 144 ("The behavior of revolutionary regimes in the past thirty years has also frequently failed to meet accepted standards of international behavior with respect to diplomatic immunity"); Wilson, supra note __, at 68-70.

147 Wilson, supra note __, at 50-51.

148 See Wilson, supra note __, at 51-52, 62-63, 82, 86.

149 See id. at 82 ("rules of diplomatic immunity from criminal jurisdiction are . . . modified when the envoy's conduct threatens the safety and security of the home state"); see generally id. at 82-86.

150 See Diplomatic Immunity and the Criminal Law, 68 Law Journal 226-227 (1929).

151 Wilson, supra note __, at 83. See also id. at 82-86; United States v. Coplon, 84 . Supp. 472 (1949).

152 See McClanahan, supra note __, at 143-44; Wilson, supra note __, at 55.

153 See Wilson, supra note __, at 62-70.

154 Id. at 71.

The third claim is that the robustness of the norm of diplomatic immunity will vary among pairs of countries, and over time, in response to differences in underlying payoffs. Respect for diplomatic immunities, far from being universal, is sensitive to variations in bilateral relations among states over time. The Soviet Union mistreated foreign diplomats with greater regularity than Russia did before and after the Soviet Union; the United States and the Soviet Union subjected each other's diplomats to more harassment during the Cold War than at other times; and states in the East Block treated diplomats from the West with less respect than states within the East block.[155] The explanation for these variations is that the diplomats of one's enemies pose a greater threat to security than the diplomats of one's friends, so more often the payoff from violating diplomatic immunity will be higher than the cost.

C. Fishing Vessel Exemption in Prize

The CIL of prize governs the circumstances in which belligerents are entitled to make captures at sea during times of war. One widely known exception to a belligerent's right of capture concerns coastal fishing vessels owned by civilians of the enemy.[156] This exemption is famous because it was recognized in the influential case, *The Paquete Habana*.[157] For that reason we make it the subject of this section. We argue that there is no evidence that states have refrained from seizing fishing vessels in order to conform to a norm of CIL. We conjecture that for the most part states have not seized fishing vessels just when their navies had more valuable opportunities. *The Paquete Habana* itself is best understood as a one-time judgment by the Supreme Court about the immediate national interest, which both misdescribed contemporary CIL and had no influence on the subsequent CIL of prize. Where the Supreme Court and treatise writers describe a robust rule of international law, we find a handful of practices scattered over hundreds of years and involving highly disparate and context-specific relations. There may have been a few instances of cooperation in bilateral repeat prisoner's dilemmas, but the fishing vessel exemption was for the most part a label attached to a practice in which states engaged independently of the actions of other states.

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155 See id. at 55-56; 62-70; 71-72; see also id. at 50 nn. 31-32.

156 This is the view in many treatises, e.g., Henry W. Halleck, International Law 124 (Sir Sherston Baker, ed., , 4th ed., 1908); William Edward Hall, A Treatise on International Law 449 (5th ed., 1904); Roland R. Foulke, A Treatise on International Law, vol. II, 363 (1920). For a recent statement of this claim, see David J. Bederman, The Feigned Demise of Prize, 9 Emory Int'l L. Rev. 31, 32 (1995). A more skeptical view, similar to ours, can be found in Anthony D'Amato, Unpublished Manuscript, ch. 5. p. 133; cf. Oppenheim, International Law 477 (1948 ed.) (calling the coastal fishing boat exemption a "general, but not universal, custom in existence during the nineteenth century")

157 The Paquete Habana, 175 U.S. 677 (1900).

1. Revisionist Account

Although the court in *The Paquete Habana* held that the fishing vessel exemption did not become a norm of CIL until the nineteenth century,[158] the Court examined the prehistory of the CIL norm, and such an examination is instructive.[159] Prior to the nineteenth century, pairs of states would occasionally agree not to attack each other's civilian fishing vessels. These agreements included a treaty signed by the Kings of France and England in 1403; treaties, joint edicts, and mutual understandings followed between France and the Holy Roman Empire in 1521; and treaties and understandings between France and Holland in 1536 and again in 1675. France appears to have had a long-standing practice of allowing admirals to conclude fishing truces with enemies "provided that the enemy will likewise accord them to Frenchmen." In 1779 France announced that it would not seize vessels carrying fresh fish, and in 1780 the seizure of an English fishing vessel was declared illegal.[160] At roughly the same time, England stopped seizing French fishing boats. Yet shortly thereafter England authorized the seizure of French fishing vessels, and in 1793 the French National Convention asked the executive to conduct reprisals. England again authorized the seizure of French, and also Dutch, fishing boats in 1793. An English court held in 1798 that:

> In former wars it has not been usual to make captures of these small fishing vessels; but this rule was a rule of comity only, and not of legal decision; it has prevailed from views of mutual accommodation between neighboring countries, and from tenderness to a poor and industrious people. In the present war there has, I presume, been sufficient reason for changing this mode of treatment....[161]

Britain and France finally officially stopped seizing each other's fishing boats at the beginning of the nineteenth century, but again the British announced that their action was "'nowise founded upon an agreement but upon a simple concession;' and 'this concession would always be subordinate to the convenience of the moment.'"[162] Although the French Council of Prizes would, in 1801, declare that capture of fishing vessels contradicted "the principles of humanity and the maxims of international

158 Id. at 694.

159 Our discussion is based on the account in The Paquete Habana, id. at 687-90.

160 Le Jean et Sara, 2 Code des Prises 721 (ed. 1784).

161 The Young Jacob and Johana, 1 C. Rob. 20 (1798).

162 The Paquete Habana, 175 U.S. at 693 (quoting 6 Georg Friedrich Martens, Recueil des Traites 514 (2d ed. 1817-1835).

law,"[163] it seems that the British view was a truer description of affairs, as even the Supreme Court in *The Paquete Habana* seemed to acknowledge, remarking that up to this time the exemption "may have rested in custom or comity, courtesy or concession...."[164] Yet the Supreme Court must have included this history in order to buttress its claim that a CIL norm had emerged in the nineteenth century — that a CIL norm was, in effect, latent prior to the nineteenth century, ready to spring forth when conditions ripened.

Four observations are in order here. First, states' agreements and announcements should be distinguished from their actions. If two states announce their intentions, but neither carries them through, it is hard to say that the announcements create a norm of CIL. Becuase the Court cites no evidence of the states' behavior, and refers only to statements, we cannot place much weight on the evidence that is provided. Second, one must be cautious about generalizing from limited cases. If W and X have an agreement in 1450, and Y and Z have a similar agreement in 1550, it does not follow that all are part of any "implicit" agreement thereafter. Third, France's and Britain's positions on the CIL norm were clearly tendentious. France, which had a weak navy, sought to protect its coastal fishery by international agreement, whereas Britain, which has a powerful navy, saw no reason to yield its advantage.

Fourth, it is interesting that the handful examples of agreements or understandings are consistent with the conditions for cooperation in a bilateral repeat prisoner's dilemma. The states that were involved had neighboring or proximate coasts, enjoyed about equal military power (in the sense that they were "major," as opposed to minor, powers), and confronted each other in bilateral conflicts. The proximity of coastlines meant that they would have ample opportunity to prey on the fishing boats of each other. Their equal power meant that no one could enjoy an advantage in this conflict. A state could prey on the fishing boats of another state but at the same time would lose its own fishing boats. Thus, cooperation could lead to mutual improvement, as suggested by the model of the bilateral repeat prisoner's dilemma. But if that is so, what is striking is how rarely cooperation was achieved. Wars raged endlessly over centuries, but one can find little evidence of cooperation, and there is no evidence that states generally considered themselves obliged to refrain from seizing coastal fishing vessels independently of the behavior of other states.

With this background, let us examine the evidence that persuaded the Supreme Court that a CIL norm emerged in the nineteenth century. In 1806 England declared

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163 La Nostra Segnora de la Piedad (1801), 25 Merlin, Jurisprudence, Prise Maritime § 3, arts. 1, 3 (5th ed. 1827).

164 The Paquete Habana, 175 U.S. at 694.

that it would not seize Prussian vessels carrying fresh fish and in 1810 it made a similar declaration with respect to French vessels.[165] Some treatise writers mentioned that England and France did not disturb each other's fisheries,[166] though one author dissented from this description.[167] The United States did not seize coastal fishing boats during the Mexican War on the east coast — though it did authorizes its navy to capture "all vessels" under Mexican flag on the west coast, with no mention of an exemption for fishing vessels.[168] A treaty between the United States and Mexico, as did earlier treaties between the United States and Prussia, prohibited the seizure of fishing boats in time of war.[169] France directed its navy not to seize coastal fishing vessels in the Crimean War in 1854, in its war with Italy in 1859, and during the Franco-Prussian War in 1870, though with a rather significant exception — "unless naval or military operations should make it necessary."[170] England did destroy fishing boats during the Crimean War, also for military purposes.[171] Finally, since the English orders of 1806 and 1810, "no instance has been found in which the exemption ... has been denied by England or any other nation."[172] This is all the evidence that the Court recounts.[173]

These practices do not support a conclusion that a practice followed from a sense of legal obligation emerged in the nineteenth century. The reasons for denying the existence of a CIL norm in the nineteenth century are similar to the reasons for denying the existence of a CIL norm prior to the nineteenth century.

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165 Id.

166 Id. at 696, citing 2 Ortolan, 54; De Boeck, § 193, Hall § 148.

167 Henry Wheaton, A Digest of the Law of Maritime Captures and Prizes ch. 2, § 18, at 695-96 (1815).

168 The Paquete Habana, 175 U.S. at 696-97.

169 Id. at 698-99. According to the dissent, the treaties did not exempt seizure of fishing vessels as prize. Id. at 720.

170 Id. at 699.

171 Id. at 699.

172 Id. at 700.

173 The Court's opinion contains an extremely lengthy discussion of the treatises, which, however, contain no information beyond the list of cases and other documents cited by the Court. For example, one treatise mentions the practices of France and England at the end of the eighteenth century and during the Napoleonic Wars, and the cases, Le Jean and Sara and La Nostra Segnora de la Pietad. 1 De Cussy, supra note __ at 291. The treatises do usually contain the authors' judgment about whether the cases cited are sufficient to support a CIL norm. De Cussy says yes. Id. Another author says that a custom of exempting fishing boats from capture "has fallen into disuse; and it is remarkable that both France and England mutually reproach each other with that breach of good faith which has finally abolished it." The Paquete Habana, 175 U.S. at 696, quoting Wheaton, supra note __, at ch. 2, § 18 (1815). Other treatises recognize a custom but deny the existence of a rule of international law. Theodore Ortolan, Regles internationales et diplomatie de la mer 702 (4th ed. 1864); see also William Edward Hall, A Treatise on International Law § 148 (5th ed. 1904).

First, we have the problem of evidence. A few states announced an intention not to seize fishing vessels during times of war, and other states remained silent on the issue, without "denying" the exemption, to be sure, but without affirming it, either. The Supreme Court does not cite any evidence about states' actual practices, other than England's *failure* to conform with the exemption during the Crimean War.

Second, there is the problem of generalization. In a handful of isolated instances, a few states announced that they would not seize fishing vessels during times of war. Major wars were rare after Napolean, so their commitments were rarely tested. The Mexican War was a one-sided affair. The Franco-Prussian War, also one-sided, was short and did not involve major encounters at sea. Only the Crimean War and American Civil Wars counted as major wars that involved important encounters at sea. In the Crimean War the allies did seize fishing vessels while Russia was in no position to harass allied fisheries hundreds of miles away. And we have no evidence about behavior during the Civil War. The few, scattered instances of self-restraint do not support the claim that states recognized a norm of CIL.

Third, although it is clear in retrospect that states were becoming increasingly reluctant to seize fishing vessels as prizes, the most plausible explanation for this trend is independent of developments in international law. Over the course of the nineteenth century, militaries professionalized: they relied more on conscripts and less on volunteers; more on nationals and less on mercenaries; more on wages and promotions and less on booty.[174] The reason for this trend appears to have been that advances in technology and finance allowed states to field larger armies and sail larger navies, and coordinate them in battle.[175] Coordination relies on discipline, and discipline breaks down when soldiers or sailors receive compensation when they seize property from enemies.[176] Although no explanation was provided in the legislative history, Congress' abolition of most forms of prize in 1899[177] suggests that authorities had come to believe that prize was not a useful way of compensating naval officers and sailors. Other modern states were no doubt in the same position. That coincidence of interest in the professionaliziation of the military, along with the paucity of naval wars (see section A, above), probably accounts for the lack of seizures of civilian fishing vessels when their was not an immediate military necessity.

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174 See Douglas W. Allen, Compatible Incentives and the Purchase of Military Commissions, 27 J. Legal Stud. 45, 59-62 (1998); see also Geoffrey Brennan & Gordon Tullock, An Economic Theory of Military Tactics, 3 J. Econ. Beh. & Org. 225 (1982).

175 Id. at 56-57 (army), 64-66 (navy).

176 Id. at 59-62.

177 Arnold W. Knauth, Prize Law Reconsidered, 46 Colum. L. Rev. 69 (1946).

This explanation is what we have called "coincidence of interest." Navies discouraged warships from seizing fishing vessels in order to maintain discipline. They did this independently of the actions of other navies. Their behavior along this dimension coincided because all navies had to submit to the requirements created by the same new technological advances. Although it is possible that some states did not seize fishing vessels because they were involved in a repeat prisoner's dilemma, the evidence for such a claim is thin. The North and the South in the Civil War may have seen advantages in not attacking each other's fishing vessels, but we have no evidence that they engaged in such restraint. Similar comments could be made about the French and the Prussians. And there is no evidence of a universal norm to which states adhered because of a fear of multilateral retaliation or because of a sense of moral or legal obligation.

The coincidence of interest hypothesis, moreover, is supported by the extremely limited scope of the fishing exemption norm, as interpreted subsequently by courts and treatise writers.[178] As we have seen, the CIL norm was undercut by two important exceptions: for deep-water or "commercial" vessels, and for vessels that are seized under conditions of military necessity. The exceptions controlled all of the cases involving the seizure of fishing vessels after the Napoleonic Wars, as far as we have found. Indeed, *The Paquete Habana* is the *only* case that we have found, in which a seizure was reversed, and it appears to have done so by ignoring the unlimited exception for military exigency. Perhaps, the decision would have been otherwise if the United States had claimed that the sailors on *The Paquete Habana* and on *The Lola* might have been used as conscripts by Spain. That is surely a valid military reason for detaining the vessels.[179] One might argue that other cases did not arise because states never seized "true" coastal fishing vessels out of a devotion to international law. Their vessels not having been seized, the owners did not have to bring claims in prize courts. But as we said at the start, the failure to seize vessels is consistent with the hypothesis that navies had more valuable opportunities. Not seizing fishing vessels, like not drilling holes in one's own ships, was independently rational, not a matter of cooperation.

One might argue that the proceeding discussion is beside the point, that, as a matter of positive law, the Supreme Court's decision that a CIL of prize existed brought that CIL norm into existence. A CIL norm can be said to exist, however, only if it influences the behavior of states in some way. There is no evidence that the rule laid down in *The*

178 See Section 2, *infra.*

179 See infra.

Paquete Habana had any influence on the behavior of any state, including the United States, other than the United States' payment of damages to the claimants in that case.

The Paquete Habana has been cited many times by American courts, but almost always for its famous proposition that "international law is part of our law,"[180] and never as the basis of a decision in a prize case involving coastal fishing vessels. Indeed, we have found no American cases involving the seizure of fishing boats subsequent to the decision in *The Paquete Habana.* Although this is no doubt due in part to the decline of prize, it does mean that there is no evidence that it influenced U.S. courts. As for its influence on U.S. political officials, the Supreme Court acknowledged that its interpretation of CIL in *The Paquete Habana* was subject to, among other things, a "controlling executive or legislative act."[181] It was clear before and after the decision that judicial interpretations of CIL are not binding on the federal political branches.[182]

Nor did *The Paquete Habana* have influence beyond the United States. The coastal fishing exemption was ratified at the Hague Conference of 1907, where Britain for the first time agreed to the exemption as a legal principle.[183] The text reads: "Vessels used exclusively for fishing along the coast or small boats in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo."[184] Many delegates stated that the purpose of the exemption was to protect coastal fishing on the humanitarian grounds that it was a small industry and fishermen were usually poor.[185] But delegates also pointed out that fishing vessels may be used for military purposes, that the fishermen themselves might convey information about naval movement to the enemy, that the enemy might plant spies on the fishing vessels, that the enemy might transport contraband on the fishing vessels, and that the fishing vessels might be used as weapons.[186] This explains why the exemption was limited to vessels "exclusively" used for fishing. It also explains why the exemption did not specify what constituted a fishing vessel or what it meant to fish along the coast, in effect leaving these important issues to be determined by the nations involved. As Colombos explains:

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180 See, e.g., First National City Bank v. Banca Para El Comercio Exterior de Cuba, 462 U.S. 611, 622 (1983); Princz v. Germany, 26 F.3d 1166, 1174 (D.C. Cir. 1994).

181 175 U.S. at 700

182 See Restatement (Third), supra note __.

183 L. Oppenheim, International Law: A Treatise 477-78 (7th ed. 1952).

184 Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, Chapter 22, Article, 3, reprinted in 2 James Brown Scott, The Hague Peace Conferences of 1899 and 1907, at 465 (1909). And see the uninformative comments in id., v. 1, at 617; 3 The Proceedings of the Hague Peace Conferences, Conference of 1907 (James Brown Scott ed. 1921).

185 3 The Proceedings of the Hague Peace Conferences, Conference of 1907, at 956, 1010, 1160, passim.

186 3 The Proceedings of the Hague Peace Conferences, Conference of 1907, at 956, 957.

> The Convention does not provide any limit of tonnage or crew, or any special construction, type or propulsion required in order to bring a vessel within the description of a fishing vessel. Nor does it prescribe the limit of territorial waters or the extent of the high seas within which fishermen are allowed to ply their trade. It was obviously felt by the framers of the Convention that these limits vary according to different places where fishing is carried out, and should best be left for determination to the contacting Powers themselves.[187]

In short, the exemption did not extend to cases where nations would have a significant interest in seizing fishing vessels.

There is no evidence that the Hague Convention or related agreements influenced the treatment of coastal fishing vessels by belligerent states, or, for that matter, that the norm of CIL identified in *The Paquete Habana* had any influence. Treatise writers say that states did not seize fishing boats between 1898 and World War I, as though this showed that all states respected the norm. But it does not, since the major European powers and the United States were not at war with each other during that time. The two major wars during the period do not support the existence of such a norm. The Boers were landlocked, and they had no means to threaten British fishing.[188] The Japanese seized numerous Russian fishing vessels during their war, and the Japanese Prize courts rejected claims by owners of the vessels, generally on the grounds that these vessels were engaged in deep-sea fishing and were operated by companies.[189] These courts acknowledged the existence of the Hague Convention, but they distinguished it on the grounds that it applied only to small, coastal fishing vessels owned by individuals, and they did not speculate as to whether the Hague Convention might be binding in other circumstances. There is thus no evidence that the Hague Convention or the *Paquete Habana* influenced behavior during the Russo-Japanese War.

The same is true of British prize courts during World War I. In *The Berlin*, the court held that the exemption did not apply to the vessel in question because of its size (110 metric tons) and of the locations where it had been engaged in fishing, and was

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187 See C. John Colombos, A Treatise on the Law of Prize 163 (3d ed. 1936).

188 See supra __.

189 See The Michael (1905) (holding that the exemption from capture of small fishing boats does not apply because the vessel in question was owned by a company and engaged in deep-sea fishing), reprinted in 2 C.J.B. Hurst and F.E. Bray, Russian and Japanese Prize Cases 80, 82 (1913); The Alexander (1905) (same), reprinted in id., at 86; The Lesnik (1904) (same), reprinted in id., at 92.

condemned.[190] Although the court did cite *The Paquete Habana*, among other cases, as evidence of the fishing exemption's status as a norm of CIL, this acknowledgment occurred in dicta, and therefore cannot be used as evidence of the influence of this rule on state behavior.[191] In *The Marbrouck*, the French Prize Court held that the exemption did not apply to the vessels in question because they supplied blockaded ports.[192] We have found no other relevant cases arising from World War I,[193] and there is evidence that Germany sank fishing boats during World War I.[194] During the first year of World War II, Germany may have sunk as many as 200 fishing vessels.[195] There have been very few prize cases since World War I, and none that we know of involving fishing vessels.

2. Conclusion

The most parsimonious explanation for the evidence is that states seized fishing vessels when they had a military reason to do so, whether the reason was to reward sailors under the rules of prize, to clear away obstructions or spies, or to terrorize the population -- and they did not seize fishing vessels when they had a military reason not to so, for example, to avoid the trouble[196] or to maintain naval discipline. One might conjecture that a few cases, perhaps some of the interactions between France and England, are attributable to the solution of bilateral repeated prisoner's dilemmas. Most cases, however, are best attributable to simple lack of anything to cooperate about. If one insists on looking for a general pattern, one might conclude that most of the time states did not seize fishing vessels after the Napoleonic Wars because most of the time they were not at war, and when they were at war, their navies had better uses. One may dignify this pattern of behavior with the CIL label, if one wants, as long as one understands that it hardly reflects international cooperation or anything that is noteworthy or desirable, and it is certainly not the result of states acting out of a sense of legal or moral obligation.

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190 James Wilford Gardner, Prize Law During the World War 241-43 (New York, 1927), citing II Loyd, 43; I, Br. & Col. Pr. Cas., 29. See also the Stoer (1916), V, Loyd, 18 (seizure permitted, not coastal fishing vessel because not close enough to the coast).

191 Contrary to the assertions in treatises, e.g., Colombos, supra note __, at 146.

192 The Marbrouck, J.O. June 25, 1918, at 5506.

193 See the brief treatments in Garner, Prize Law During the World War, pp. 241-43; Colombos, supra note __, at 145-47.

194 See James Wilford Garner, International Law and the World War 362 & n.2 (1920).

195 Colombos, supra note __, at 252, n. 1; Oppenheim, supra note __, at 478.

196 American practice during revolutionary war and war of 1812 was to sink merchant vessels that were not very valuable, since "it will be imprudent and worse than useless to send them in." See Garner, supra note __, at 364 and 366.

D. Territorial Sea

Prior to the eighteenth century, many powerful maritime nations proclaimed control over large chunks of ocean.[197] These nations were unable to sustain these claims, however, and by the eighteenth century the seas became viewed in theory as free areas that no nation could appropriate.[198] One limitation on this so-called "freedom of the seas" was the power that a nation retained over the territorial sea adjacent to its coast. According to the doctrine of territorial jurisdiction, a nation had plenary jurisdiction within its territorial sea and no jurisdiction without it. Other nations could freely exploit and navigate the sea up to the boundary of a nation's territorial sea. But they could no more operate within a nation's territorial sea without the nation's permission than they could operate in a nation's territory without permission.[199]

Jurists originally conceived the territorial sea as the water a nation defended in order to protect its territorial sovereignty.[200] Bynkershoek famously captured the idea with the apothegm that "the territorial sovereignty ends where the power of arms ends."[201] In the Seventeenth and eighteenth centuries the territorial sea did not have a settled breadth.[202] During this time Bynkershoek's dictum transformed into the idea that a nation's sovereignty extended as far as it could fire a cannon ball. By the end of the eighteenth century, many who embraced the cannon shot rule began to identify it with a three-mile breadth, the approximate distance at the time that cannonballs could at that time be projected.[203]

Conventional wisdom holds that a three-mile territorial sea was a rule of CIL during most of the nineteenth and the first half of the twentieth century.[204] The basis for this

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197 Most famously, Portugal and Spain claimed the exclusive right of navigation and trade in much of the Atlantic during the sixteenth century, and the Kingdom of Denmark-Norway asserted sovereignty over the Norwegian Sea from the fourteenth to the sixteenth centuries. See Philip Jessup, Law of Territorial Waters and Maritime Jurisdiction 3-4 (1927); Bernhard G. Heinzen, The Three Mile Limit: Preserving the Freedom of the Seas, 11 Stan. L. Rev. 597, 598-99 (1959).

198 See Cunard S.S. Co. v. Mellon, 262 U.S. 100 (1923); Jessup, supra note __, at 4-6; Heinzen, supra note __, at 599-601.

199 There is an "exception" to this rule for "innocent passage," discussed infra.

200 See Jessup, supra note __, at 5.

201 Cornelis van Bynkershoek, De Dominio Maris Dissertatio (1702).

202 Ian Brownlie, Principles of Public International Law 187-88 (4th ed. 1990)

203 See R.R. Churchill & A.V. Lowe, The Law of the Sea 65 (1985).

204 For a very few of many examples, see Jessup, supra note __, at 66; Heinzen, supra note __, at 629, 634; Amos Hershey, Essentials of Public International Law 196 (1905); Martin Conboy, The Territorial Sea, 2 Can. Bar Rev. 8 (1924); Thomas Baty, The Three Mile Limit, 22 Am. J. Int'l L. 503 (1928); Charles Pergler, Judicial Interpretation of

conventional wisdom is essentially as follows. In the nineteenth and twentieth centuries, the three-mile rule was officially championed by several countries -- most notably the England and United States -- as a rule of CIL.[205] Many nations that attempted to assert a broader jurisdiction than three miles retracted these claims in the face of threats or protests, usually from the United States or England.[206] Sometimes, nations asserting jurisdiction beyond the three-mile range paid damages.[207] The three-mile rule also appeared in numerous international agreements.[208] And it was broadly -- though not unanimously -- supported by jurists.[209]

Our theory suggests that the three-mile rule would have little influence on national behavior, and that behaviors thought to support the three-mile rule would actually reflect either coincidence of interest, coercion, a bilateral prisoner's dilemma, or bilateral coordination. It also suggests that behavioral patterns related to territorial jurisdiction would not be stable, and would change with changes in state interests and technology. This Section argues that the historical evidence supports these claims rather than the traditional conception.

1. Revisionist Account

Large tomes analyze the CIL of the territorial sea.[210] We cannot examine here the thousands of instances of state practice associated with the three-mile rule. But such a detailed analysis is not necessary to see that there was no general and consistent practice of states following the three-mile rule from a sense of obligation.

International Law in the United States 105 (1928); 1 Robert Phillimore, Commentaries Upon International Law (3d ed. 1879); John Westlake, International Law (2d ed. 1910); L. Oppenheim, International Law (2d ed. 1912); 1 Calvo, Le Droit International Theoretique et Pratique 479-80 (5th ed. 1896); Amos Hershey, Essentials of International Public Law 196 (912); 1 Charles Cheney Hyde, International Chiefly as Interpreted and Applied by the United States 251-52 (1922). For further examples, see Stefan Riesenfeld, Protection of Coastal Fisheries Under International Law 29-98 (1942).

205 See Heinzen, supra note __, at 618; C. John Colombos, The International Law of the Sea 84-88 (5th rev. ed. 1962); Jessup, supra note __, at 62-63..

206 For examples, see Heinzen, supra note __, at 630-32.

207 For examples, see id. at 636.

208 Most prominently, England-United States Fishing Treaty (1818); the North Sea Fisheries Convention (1882), and the Suez Canal Convention (1888).

209 For a summary of the views of jurists on this point during the period 1800-1942, see Riesenfeld, supra note __, at 29-98. Prominent skeptics of the ostensible CIL three-mile rule writing in English include William E. Hall, International Law 126 (1880); James Brierly, The Law of Nations 102 (1928); and Riesenfeld, supra.

210 Notably Jessup, supra note __; Riesenfeld, supra note __; Christopher Meyer, The Extent of Jurisdiction in Coastal Waters (1937); Thomas Fulton, The Sovereignty of the Sea (1911).

The most immediate problem with the traditional account is that as many nations rejected the three-mile rule as adhered to it.[211] The Scandinavian countries always asserted at least a four-mile territorial sea;[212] Spain and Portugal consistently asserted that the territorial jurisdiction band was six miles wide;[213] Russia (and later the U.S.S.R.) frequently asserted claims beyond the three-mile band;[214] and various other less significant countries claimed jurisdiction beyond the three-mile band.[215] It is true that some of these nations sometimes asserted jurisdiction only up to three miles in the face of threats of retaliation, usually from England or the United States. To take one of dozens of examples, in 1821 Russia claimed jurisdiction up to "100 Italian miles" off the coasts of Eastern Siberia and Northwest America, but ultimately agreed to a three-mile rule by treaty with England and the United States following protests from both countries.[216] In these cases, the resulting behavioral regularity is best explained as coercion rather than as following a compulsory CIL norm. The coercion theory is supported by the fact that threats and especially complaints were often not heeded, and practice inconsistent with the three-mile rule frequently went unabated.[217] It is also no coincidence that the most successful enforcers were Britain, the preeminent naval power, and the United States, a major naval power -- both states with a strong interest in limiting encroachment on the freedom of the seas by the territorial sea, and the power to enforce these interests.

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211 See Riesenfeld, supra note __, at 125-250. Riesenfeld summarizes his comprehensive 1942 examination of state practice by concluding:

> There are many nations, like Belgium, Brazil, Chile, Denmark, Ecuador, Egypt, Estonia, Germany, Great Britain and the Dominions, Iceland, Japan, Latvia, the Netherlands, Poland, the United States and Venezuela, which do not adhere at all to [the three-mile rule]. On the other hand, there are likewise many other nations which do not adhere at all to this principle, or do so only to a very limited extent, such as Argentina, Columbia, Cuba, Finland, France, Greece, Honduras, Italy, Mexico, Norway, Peru, Portugal, Rumania, Russia, Spain, Sweden, Turkey, Uruguay, and Yugoslavia.

Id. at 280. Jessup's 1927 survey reaches broadly similar conclusions about state practice, but still maintained that a core three-mile CIL rule existed. Jessup, supra note __, at 3-210.

212 See Heinzen, supra note __, at 605-12; Riesenfeld, supra note __, at 188-94; 221-30.

213 See Jessup, supra note __, at 41-43; Riesenfeld, supra note __, at 175-80.

214 See Jessup, supra note __, at 26-31; Riesenfeld, supra note __, at 194-203.

215 See Riesenfeld, supra note __, at 280.

216 See Riesenfeld, supra note __, at 144-46; for other examples, see Heinzen, supra note __.

217 Thus, for example, Spain ignored some Britain complaints in the nineteenth century about Spanish jurisdictional claims and seizures beyond the three-mile limit. See Riesenfeld, supra note __, at 146-47. "In 1874, Great Britain tried . . . to bring about an international demarche of the maritime powers in favor of the three mile rule and against the Spanish claims, but most of the other powers either did not want to commit themselves, or disagreed with the British point of view." Riesenfeld, supra note __, at 147.

The absence of a general and consistent state practice is confirmed by the debates and resolutions in various official conferences throughout the period, which reveal stark disagreement about the breadth of the territorial sea.[218] In addition, the treatise writers were deeply split.[219] Those who claimed that CIL required a three-mile band were predominantly English-speaking jurists who aped their nations' views of CIL.[220]

Turning to the details of state practice, many nations throughout the period enforced anti-smuggling and related security laws outside of the three-mile band.[221] The standard view explains these examples away as "exceptions" to the three mile rule or as actions that other nations did not challenge for reasons of "comity."[222] A better explanation is that the coastal nation has a strong interest in asserting jurisdiction beyond three miles in this context, and other nations usually have little reason to encourage smuggling into the coastal nation. This is not to suggest that all anti-smuggling regimes created such a coincidence of interest. Sometimes the assertion of anti-smuggling jurisdiction beyond the three-mile limit resulted in protests, although

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218 For example, widespread disagreement about the scope of the territorial sea precipitated the North Sea Fisheries Convention of 1882. See Fulton, supra note __, at 630-32; Riesenfeld, supra note __, at 149-50. Although the parties to the Convention eventually agreed by treaty to a three-mile rule for fishing, the conference leading to the Convention was marked by disagreement about territorial sea requirements under CIL. Similarly, at the 1930 Hague Conference for the Progressive Codification of CIL, twenty states sought a three-mile territorial, four states sought a four-mile territorial sea, and twelve states sought a six-mile territorial sea, and many states sought rights over contiguous zones beyond three miles. See Churchill & Lowe, supra note __, at 66. Both the first and second United Nations Law of the Sea conferences -- in 1958 and 1960 -- tried and failed to agree upon a limit for the territorial sea. Id.; Heinzen, supra note __, at 645-48. On the inability of various private groups devoted to codification to agree on a territorial sea limit during this period, see Riesenfeld, supra note __, at 99-111.

219 Riesenfeld's comprehensive analysis of the treatises during the period led him to the following conclusion:

> Of the 113 different authors who expressed views on the question of the territorial sea between 1800 and 1899, fifty two favored the cannon shot rule, fifteen the cannon shot rule or the three-mile rule, twenty seven the straight three mile rule, and one a different fixed measure, while eighteen took the view that the question should be answered on different grounds taking account of the interests involved, and that the states were free to choose this method. Of the 114 different authors who have dealt with the question since 1900, fourteen favored the cannon shot rule, six the cannon shot or three-mile rule, forty-one the straight three-mile rule, and one a different measure, while fifty-two took the view either that there was no international agreement on the question and that states were free to make any reasonable claim, or that the question should be solved according to international law on a basis which varies according to the interests and circumstances involved.

Riesenfeld, supra note __, at 279-80. Riesenfeld notes that the figures should be read with some caution because some writers copied from others without independent analysis. Id. at 279.

220 See Fulton, supra note __, at 681.

221 See Manchester v. Massachusetts, 139 U.S. 240, 258 (1891) ("governments, . . . for the prevention of frauds on its revenue, exercise an authority beyond [the three-mile] limit"); see generally Jessup, supra note __, at 19, 25, 76-96 (surveying this practice); Fulton, supra note __, at 594 (same point).

222 This is the strategy of Jessup, supra __.

these protests did not always, or even usually, result in a retreat to the three-mile line.[223] Even a relatively weak state is in a good position to patrol coastal waters; so a large state that seeks to preserve the three-mile line may be too weak to its enforce its will when many weak states violate the rule.

A related problem was the scope of the band of territorial sea in which a neutral nation's ships could remain immune from belligerent capture. During the period in question, some nations asserted a three-mile zone of neutrality, but many other nations asserted zones of neutrality beyond three miles.[224] These regulations were rarely tested because there were relatively few maritime wars in the seventy years prior to World War I.[225] But the few international clashes in this context are revealing. For example, during World War I Britain successfully checked Norway's assertion of a four-mile neutrality zone by capturing Norwegian ships three miles outside of Norway; but at the same time England (and the United States) acquiesced in Italy's assertion of a six-mile neutrality zone "out of courtesy."[226] Scholars have reconciled these actions by arguing that the Norwegian example exemplifies the true CIL rule and that the Italian deviation was permitted out of comity. A better explanation is that England had the power to coerce compliance with the three-mile rule and a significant interest in doing so against Norwegian shipping because of its destination to Germany, but it had no interest in enforcing the three-mile rule against its ally Italy, and thus acquiesced. The relationship between England and Norway was one of coercion; the relationship between England and Italy was one of coincidence of interest.

The customs and the neutrality deviations from the ostensible three-mile rule are examples of the larger principle that a nation could assert jurisdiction beyond the three-mile limit in self-defense or for self-preservation.[227] This "exception" to the three-mile principle – analogous to the military necessity exemption in the prize cases or the national security exception to ambassadorial immunity – suggests that the three-mile rule did not limit national action in cases where nations had powerful interests in exceeding the limit. A similar story explains the practice of asserting jurisdiction beyond three miles over the rare, valuable, and exhaustible sedentary fisheries such as

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223 For example, England complained about the 1853 Spanish seizure of the British ship *Fortuna*, but Spain ignored the complaint, and England dropped the matter after failing to rally support from other nations for its position. See Riesenfeld, supra note __, at 146-47.

224 For a few of many examples, see Jessup , supra note __, at 25, 47-48, 103-05.

225 See Fulton, supra note __, at 604, 651.

226 See Riesenfeld, supra note __, at 163; Jessup, supra note __, at 25 n. 86, 34.

227 See Jessup, supra note __, at 96-101.

coral and oysters.[228] The same idea inheres in the single exception to exclusive jurisdiction *within* the three-mile zone, the CIL right of innocent passage.[229] The right of innocent passage permits a foreign ship to pass through the territorial sea unless the ship does something to prejudice the security, public policy, or fiscal interests of the state.[230] There is indeed a long-term behavioral regularity of nations not seizing foreign ships passing close to shore that are deemed innocent. But nations have varying and self-serving definitions of innocence; the "rule" does nothing to prevent a nation from seizing a ship that the nation perceives to be a threat to its interest. What international scholars consider to be CIL is nothing more than a description of states acting in their national interest: states seize ships passing through their territorial sea exactly when they have reason to do so.[231] All of these examples are inconsistent with the traditional account of the three-mile rule; all have straightforward explanations within our framework.

Another embarrassment to the traditional account that makes sense within our theory concerns the double standards of the three-mile rule's proponents. During the same period in which Great Britain championed and enforced the three-mile rule, it acted to preserve its ability to assert jurisdiction beyond three miles when it suited its needs.[232] For example, during the eighteenth and nineteenth centuries, the English Hovering Acts asserted customs jurisdiction beyond the three-mile range.[233] And in legislation and treaty-making during the late nineteenth century, England was careful not to commit itself to the three-mile rule generally, and to preserve its rights to assert jurisdiction beyond the three-mile limit with respect, for example, to certain fishing rights, bays, folded coasts, pearls and coral banks.[234] Similarly, the United States

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228 See id. at 13-17.

229 See id. at 120.

230 See id. at 120-123.

231 Cf. William Edward Hall, A Treatise on International Law 215 (7th ed. 1915) ("the state is . . . indifferent to . . . what happens among a knot of foreigners so passing through her [territorial sea] as not to come in contact with the population. To attempt to exercise jurisdiction in respect of acts producing no effect beyond the vessel, and not tending to do so, is of advantage to no one.")

232 See Riesenfeld, supra note __, at 131, 148-154, 281; see also Fulton, supra note __, at 651-52 ("Great Britan has "taken pains to make it clear that in adopting a three-mile limit for particular purposes they do not abrogate their right to the farther extent of sea that may be necessary for other purposes.").

233 England repealed the Hovering Acts in the late nineteenth century but did not fully eliminate its authority to assert customs and related jurisdiction over foreign ships beyond three miles. See Riesenfeld, supra note __, at 131, 142.

234 This point is detailed in Riesenfeld, supra note __, at 148-171. Prominent examples of this phenomenon are: (A) England's 1878 Territorial Waters Jurisdiction Act provided that criminal jurisdiction would be exercised for three miles to sea, but which also preserved jurisdiction beyond the three-mile range "as is necessary for the defence and security of such dominions," see id. at 148-49; Fulton, supra note __, at 591-92. (B) The 1881 North Sea Fisheries Convention included a three-mile rule for fishing rights over English objections. England resisted the explicit three-

protested Russian restrictions on sealing beyond three miles in the Bering Sea when Russia owned the sea, but after the cession of Alaska to the United States in 1867, the United States, pursuant to an act of Congress asserting U.S. dominion over the entire Bering Sea, seized seal hunters in the Sea beyond the three-mile limit.[235] This is one of many examples of the United States "var[ying] her principles and claims as to the extent of territorial waters, according to her policy at the time."[236] These phenomena show that, as in the other case studies, nations will assert changing and inconsistent readings of CIL consistent with their interests.

Throughout the period, the greatest clashes over territorial jurisdiction concerned the area of water to which a nation's citizens would have exclusive fishing rights. Coastal nations with weak navies sought to maximize the breadth of exclusive fishing rights; nations with powerful navies sought to minimize the scope of exclusivity. There was little stability in actual practice.

As one would expect from their proximity and shared body of narrow water, England and France (and to a lesser degree England and Belgium and England and Holland) frequently clashed over the three-mile rule for fishing.[237] To the extent that the three-mile rule was effectively embraced, it was done so by virtue of carefully negotiated bilateral and multilateral treaties rather than customary practice, and even these treaties were frequently violated. Both sides captured ships of the other fishing beyond the three-mile limit, and both sides had ships that fished within the other's three-mile limit. To be sure, the history was not one of unremitting chaos. There were short periods and limited contexts in which the two nations engaged in what might be called cooperative behavior, almost invariably pursuant to a treaty. The explanation for such cooperation is that two states with access to a fishery find themselves in a bilateral

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mile rule in order to maintain flexibility to protect the burgeoning trawling fishing practice of its citizens on foreign coasts. See Riesenfeld, supra note __, at 152; Fulton, supra note __, at 632-34. The English implementing statute made clear that the three-mile zone only extended to matters explicitly included within the treaty, and that England maintained jurisdiction beyond the three-mile zone in a variety of contexts, see Riesenfeld, supra note __, at 149-52. (C) The Scotch Herring Fishery Act of 1889, which prohibited certain forms of trawling beyond the three-mile limit in Moray Firth (a "firth" is a Scotch term for a long, narrow sea inlet), and under which numerous Norwegian boats fishing beyond three miles (including British fishermen registered under the Norwegian flag) were prosecuted, see Jessup, supra note __, at 430-36; Riesenfeld, supra note __, at 158-60; Meyer, supra note __, at 145-165. The British government eventually restored the fines and released the ships' masters, but only after Norway agreed to prevent Norwegian trawlers from entering Firth, and not because of a rule of CIL. Meyer, supra note __, at 142-43; Riesenfeld, supra note __, at 158-160; but see Jessup, supra note __, at 430-36 (claiming that three-mile CIL rule vindicated in Moray Firth controversy). (D) England consistently asserted jurisdiction beyond three miles for purposes of sedentary fishing, such as pearls and coral. See Jessup, supra note __, at 13-17.

235 See Jessup, supra note __, at 54-57.

236 Fulton, supra note __, at 650.

237 This paragraph draws heavily on the account in Fulton, supra note __, at 605-80.

repeat prisoner's dilemma, and when conditions are favorable, cooperation will occur. Consistent with this theory, the most successful instances of cooperation -- such as the harvesting of oysters -- occurred both sides would clearly be harmed by over-exploitation, and violations were relatively easy to identify.

Throughout the period in question, Spain and Russia tried to assert fishing rights beyond the three-mile zone. In some contexts they succeeded. More often they were met with threats of force from England and the United States, and backed away to defend only a three-mile band. This is thought by some to evidence a rule of CIL. A better explanation, of course, is that England and the United States had much stronger navies and powerful interests in maximizing areas in which their nationals could fish. It is not surprising that nations with powerful navies would tend to desire the narrowest possible territorial sea, and would usually get their way.

The only puzzle is why the United States and England recognized even a three-mile territorial sea. The answer is surely that the neither the United States nor England was powerful enough both to provide safe passage to their civilian fishing vessels along the coast of a hostile power and to defend their fishing vessels close to home. Every state has a stronger interest in protecting coastal seas than maintaining rights in distant seas for the simple reason that their fishing industry can more cheaply harvest the coastal seas, which are close to shore, than distant seas. In addition, it is considerably easier to defend coastal seas, both by ship and from the shore, than to maintain power over a distant sea. Thus, every state of roughly similar power has a strong interest in agreeing not to interfere with the coastal fisheries of other states, in return for a commitment not to interfere with their own coastal fisheries. This is a classic coordination game, and the only problem -- which is characteristic of such games -- is coordinating on a particular area. What is needed is a focal point. Any band defined by a constant distance from the coastline is simpler, more "focal," than alternatives, such as particular longitudes and latitudes. So it is no surprise that the fights about the territorial sea for fishing purposes was couched in terms of band widths. To the extent that the three-mile rule was frequently (though certainly not exclusively) invoked during our period, this is explained by the fact that three miles comported with the eighteenth century cannon shot mark, the rough distance from which a nation could protect its seas from shore.[238] But of course states would have different interests over the size of the band, as the

238 Cf. Fulton, supra note __, at 694 ("It must not be forgotten that the three-mile limit was selected . . . because it had already been recognized and put into force in connection with the rights of neutrals and belligerents in time of war, representing the approximate range of guns at the time.").

optimal size for each state would vary according to local technologies and economic needs, and here we would expect the powerful states to prevail over the weak states.[239]

Finally, the fishing example illustrates how various exogenous shocks led to changes in behavior. A prominent example was trawling, a late nineteenth century development.[240] Trawling was a profitable but destructive form of fishing; trawling just outside the three-mile band disrupts fishing within the band much more than prior fishing methods. In addition, the rise of the steamship (also late nineteenth century) made trawling possible at much further distances. These developments heightened conflicts over the fishing zones, and precipitated the expansion of asserted and defended fishing zones early in the twentieth century.[241] It also explains why England began to hedge on its formal assertion of the three mile rule in the late nineteenth century. England wanted to assert trawling broadly abroad but protect fisheries at home. This led it to refrain from asserting a well-defined rule, relying instead on standards that it -- the preeminent naval power -- could interpret flexibly to suit its needs. Another example of how exogenous shocks can change behavior: as more nations gained independence, the behavioral regularities became less common.[242] Coordination games become exponentially more difficult as the number of participants increase. Although a rule may evolve that governs fishing among a few large states, it is unlikely that a rule could evolve that would coordinate the behavior of dozens of states.[243]

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239 This game can be viewed as a Battle of the Sexes: every state had an interest in a free coastal area, but different states preferred larger or smaller coastal areas. To take a simple example, suppose that state X specializes in a certain kind of fishery x, which extends from its shore to 2 miles from state Y's shore. State Y specializes in fishery y, which extends from its shore to 3 miles from X's shore. Each state would also like to fish from the fishery in which it does not specialize. In the absence of coordination, both states would fish from both fisheries, leading to exhaustion. If they could coordinate by agreeing to specalize in one fishery, exhaustion would be avoided, but such coordination would be difficult to monitor. A territorial sea rule would be easier to monitor, but each state has an interest in a different rule. X prefers a 2 mile rule, because this would allow it to exploit its entire fishery; and Y prefers a 3 mile rule, because this would allow it to exploit its entire fishery plus some of fishery x. Either rule could be an equilibrium, but as relative power changes, one can imagine that the loser under the existing rule would challenge it, and seek by treaty a change to the rule that it favors. See supra note __.

240 On this point see Fulton, supra note __, at 698-703; Riesenfeld, supra note __, at 152-55.

241 As Brown notes of the state of affairs before trawling:

> Given the technology of the period, there was little significant conflict between the interests of coastal communities in the fish stocks adjacent to the coast and of foreign, distant water fishing states, and in any event even if there had been an awareness of such conflict, the number of independent coastal states so affected would have been so small and their power and lack of coordination as such that no serious challenge to freedom of fishing could possible have been mounted.

E.D. Brown, The International Law of the Sea 8 (1994)

242 See Brown, supra note __, at 8.

243 See text accompanying supra note __ [n-player coordination games].

2. Conclusion

The CIL of the territorial sea was never uniform and never static. Nations followed different behavioral patterns in different maritime contexts in accordance with their interests and power. Behaviors changed during relatively short periods of time. The ostensible three-mile rule did little if any work in affecting the behavior of nations. Sometimes one nation had an interest in asserting jurisdiction beyond the three-mile limit, and no other nation had an interest in preventing this act. This was coincidence of interest. Other times a nation tried to assert jurisdiction but were met by a threat of retaliation from a more powerful nation. This was coercion. In yet other contexts nations engage in mutually beneficial cooperative behavior in refraining from exercising jurisdiction beyond a three-mile limit. This can be seen as a prisoner's dilemma or a coordination game. The many puzzles, inconsistencies, or "violations" that appear under the traditional view make sense when viewed through the lens of the various and changing interests at stake.

Rather than following an exogenous rule, then, states acted in their self-interest, and their behavior changed as their interests changed. What is called CIL is simply an after-the-fact description of states' behavior. In arguing for a rule of CIL, jurists once again commit the fallacies of (a) inducing a rule of CIL from a few cases that amount to a behavioral regularity in a specific context during a short period of time; (b) labeling behavioral patterns inconsistent with the ostensible rule as "exceptions" or "comity"; (c) viewing a coincidence of interest or coercion situation as evidence of cooperation; (d) and analyzing behavioral patterns without considering the different underlying logics that these patterns exemplify.

IV. Extensions

In this Section we extend the theory beyond CIL to consider its implications for related issues. We consider the domestic constitutional arrangements for identifying and enforcing CIL, and the relevance of our analysis for treaties, international organizations, and international human rights law.

A. National Interests and the Domestic Enforcement of CIL

In this Part we relax our assumption that a state's actions reflect a unitary national interest, and discuss domestic constitutional arrangements for identifying and enforcing CIL. For reasons having to do with familiarity and ease of exposition, we use the example of the United States Constitution.

Our theory of CIL offers an explanation for multinational behavioral regularities as a function of national self-interest. Thus far we have assumed a simplistic, unitary conception of a nation's interest. This assumption is clearly artificial. The national interest is a complex amalgam of the interests of domestic individuals and institutions. In the contexts in which we are concerned, calculation of the national interest requires the identification and balance of domestic and foreign relations priorities. This calculation is invariably influenced by domestic processes and institutions, and is invariably distorted by numerous domestic agency problems.[244] It is unclear whether the concept of national interest is coherent; it is certain that it is controversial.[245]

We have tried to skirt these difficult issues by relying on the assessment of the national interest identified by a nation's political leadership. Even this strategy oversimplifies, for political leadership is in many contexts not unitary. For example, the United States divides the determination of the national interest in foreign relations along several dimensions among the President, the Congress, and the Senate.[246] In addition, of course, agency problems remain. Nonetheless, the strategy of relying on political branch determinations of the national interest seems both appropriate and consistent with our theory. Every form of government overcomes the many difficulties in determining the national interest in foreign affairs by delegating the task to national political figures. And there is invariably a domestic rule of recognition that sorts out which political figure has ultimate authority in which context. We do not claim that national leadership accurately identifies the national interest; only that it does so definitively.[247]

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244 For a theoretical analysis of the interrelationship between domestic and international politics, see Robert Putnam, Diplomacy and Domestic Politics: The Logic of Two-Level Games, 42 Int'l Org. 427 (1988); see also Double-Edged Diplomacy: International Bargaining and Domestic Politics (1993) (Peter Evans, Harold Jacobsen, and Robert Putnam, eds.) (collection of essays elaborating on Putnam's model).

245 For criticisms of the use of the concept of national interest in the international relations literature, see Robert Keohane, Theory of World Politics: Structural Realism and Beyond, in Neorealism and its Critics 182-83 (Keohane ed. 1986); James Rosenau, National Interest, 11 International Encyclopedia of the Social Sciences (1968).

246 The President is generally acknowledged to be the country's representative in foreign relations, see United States v. Curtiss-Wright Export Cirp., 299 U.S. 304 (1936). But the Constitution gives Congress numerous foreign relations powers (subject to Presidential veto and congressional override) and gives the Senate an important role to play in appointing ambassadors and consenting to treaties. As Corwin correctly noted, the Constitution's allocation of foreign relations power among the political branches is an "invitation to struggle" for control of the conduct of U.S. foreign relations. Edward Corwin, The President: Office and Powers, 1787-1984 (5th ed. 1984), at 201.

247 As liberal internationalists are quick to point out, international relations broadly conceived are carried out by numerous governmental and non-governmental actors operating at a variety of levels and contexts. See, for example, Slaughter et al., supra note __. We have no quibble with this point, which does not have much relevance to CIL considered alone. The identification and application of CIL is performed primarily by governmental actors in accordance with a strict hierarchy of authority. In this section we are trying to explain how that hierarchy is consistent with, and enlightened by, our theory.

As the four case studies show, a nation's political figures -- usually but not always in the national executive branch -- determine a nation's views about the content of CIL and order national actions that either contribute to or defy the behavioral regularities that are said to constitute CIL. Our theory claims that a nation's political figures will usually base these actions on their best assessment of the nation's interest,[248] and will occasionally -- in bilateral prisoner's dilemma and related situations -- direct the nation to act against immediate advantage to obtain cooperative benefits. A nation's commitment to a particular view of CIL as in its best interest can take various forms, including treaties and statutes that purport to codify or incorporate CIL, or Executive commands, orders or agreements that announce a nation's views on CIL or direct action in accordance with a particular conception of CIL.

The Executive branch can ensure enforcement of many of these commitments. The President can, for example, order the Navy to refrain from seizing enemy goods, or direct the foreign minister to encourage adoption of a particular position in a diplomatic conference, or threaten retaliation against an enemy. All of this is consistent with our theory, and with the non-controversial point that national political leaders in a legitimate government are the best suited to identify and enforce the national interest in these contexts.

Sometimes, however, national commitments related to CIL will require domestic enforcement by courts. This introduces the problem of the domestic allocation of authority between courts and political actors in identifying and enforcing CIL. Some aspects of this problem seem consistent with our theory. For example, when the political branches incorporate their views about CIL into a treaty, statute, or executive agreement, courts enforce these enactments. Courts will apply a domestic statute or treaty even in the face of the claim that the enactment violates CIL. For courts, the political branches' official views about the content of CIL trump all other sources of CIL.[249]

It is often the case, however, that courts must apply CIL without any guidance from the political branches. The political branches perhaps specify in a treaty or statute that CIL controls a particular issue without specifying the content of the CIL rule that it is in the national interest to follow. In other, increasingly rare, circumstances, courts apply CIL directly, as "part of our law," even in the absence of any guidance from the political

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248 It does not matter to our account whether there are distortions in this assessment.

249 Restatement (Third), supra note __, at § 112, cmt. See Philip Trimble, A Revisionist View of Customary International Law, 33 U.C.LA. L. Rev. 665 (1986).

branches.[250] In these contexts, courts must determine the content of CIL on their own and enforce it. How does this practice fit with our theory? Suppose, in the example from Section II, that fishing boat owners from state j bring suit against state i, seeking compensation for the seizure of the boat by the navy of state i. The boat owners will argue that state i violated a norm of CIL. How does the court rule?

First, even when the Executive's views are not officially enacted, courts almost always defer to the Executive's informal representation about the content of CIL.[251] This can be seen as courts deferring to the branch of the government in a best position to determine both the strategic situation implicated by the case and the decision that would most further the national interest.

We must acknowledge that the famous *The Paquete Habana* decision stands as a rare counterexample. The Admiral of the Navy, with the apparent approval of the Secretary of the Navy, justified the seizure of the fishing smack at issue in that case on the grounds that the smack had a "semi-military character" and contained excellent sailors that might assist the Spanish cause.[252] In its brief to the Court, the Executive branch argued that the seizure had a military justification, constituted a valid act of Executive discretion, and was fully consistent with CIL, which contained no exemption for fishing smacks.[253] In rejecting these representations, the Court may have been influenced by the fact that the President had proclaimed that the United States would conduct the war consistently with "the law of nations" and "the present views of nations."[254] Nonetheless, *The Paquete Habana* is an exception to the usual pattern of courts deferring to the Executive's representations about the content of CIL, an exception rarely repeated, especially in cases with more significance than post-war determination of the validity of the seizure of a fishing smack.[255]

Second, in the absence of Executive guidance, our theory suggests that the court is in effect deputized to determine the course of action in the national interest. The court

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250 Today courts tend to apply CIL in the absence of apparent legislative authorization only in human rights cases involving foreign officials. See Curtis Bradley & Jack Goldsmith, The Current Illegitimacy of International Human Rights Litigation, 66 Fordham L. Rev. 319, 328 (1997).

251 See Trimble, supra note __; Restatement (Third), supra note __, at . at § 112, cmt. c. In the rare cases that it does not, the political branches retain the power to overrule the court's determination of CIL for future cases. See id. at __.

252 See Jordan Paust, Paquete and the President: Rediscovering the Brief for the United States, 34 Va J Int'l L 981 (1994).

253 Brief for the United States, in The Paquete Habana,No. 395, Oct. Term 1899.

254 The Paquete Habana, supra note __, at 304.

255 See Trimble, supra note __.

looks to all the paraphernalia of the jurisprudence of CIL -- the treatises and the history books, the UN resolutions and the pronouncements of executives, the formal understandings and the unratified treaties. But this chore can serve two different purposes. First, when the court is confident that it can determine which course of action is in the national interest, it will use CIL to rationalize the result. Biased national court interpretation of CIL is a well-known phenomenon. Second, when a court is uncertain about what is in the national interest, it can read the indicia of CIL to try to make a more objective determination of dominant pertinent behavioral regularities. These regularities are not binding on the court as a form of law. Rather, they reveal information about what other states have done in like circumstances and thus they serve as evidence about what the host state's interest may be in the case at hand.[256]

B. Treaties

As we explained above, CIL that reflects states' overcoming of a prisoner's dilemma can originate only under special conditions. Among other things, it is necessary that states be able to recognize when an action is cooperative and when an action is not. Sometimes, the status quo will supply a focal point. For example, at time 0 states do not seize the fishing vessels of other states because their navies have more valuable opportunities; at time 1 these opportunities disappear and a prisoner's dilemma comes into existence. If each state persists in the status quo, and does not seize a fishing vessel, then, as long as all of the conditions for cooperation in a repeat game are met, a CIL norm against seizing fishing vessels will develop. By contrast, if states seize each other's fishing vessels at time 0, there is no natural way to coordinate a cessation. If one state refrains from seizing the vessels of the other as a way of suggesting that joint restraint would be a superior alternative, the other state might misinterpret this action as a change in the first state's payoffs rather than as an offer to cooperate.

An obvious solution to this problem is communication. If the first state announces that it will discontinue seizure of fishing vessels but only as long as the other state does the same, the second state will not misinterpret the first state's actions. It might not believe the threat, but it will understand the threat. If it does understand the threat, it may desist as well and cooperation would result.

In most circumstances, however, optimal cooperation is complex. State i might be willing to stop seizing the fishing vessels of state j but only as long as it is certain that

256 A similar rationale may explain the *Charming Betsy* canon of construction, which requires courts to interpret statutes to be consistent with international law when possible. On this canon, see Curtis A. Bradley, The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law, 86 Geo. L.J. 479 (1998).

the crews of the vessels are not spying on state i's military operations or transporting weapons. State i might thus insist that "cooperation" in this game allows each state to stop and search fishing vessels and detain them but only if they present a threat. If no communication could exist, state j might interpret such unilateral action by state i as a violation of the focal understanding not to seize fishing vessels. The advantage of communications is that they allow states to engage in optimal cooperation, rather than engaging in moderately valuable actions that are dependent on focal points that already exist. Communication allows states to create new focal points.

We hypothesize that this is a primary function of many treaties. A treaty records the actions that will count as cooperative moves in an ongoing repeat prisoner's dilemma or coordination game. Thus, the treaty itself does not have independent binding force.[257] States refrain from violating treaties (when they do) because they fear retaliation from the treaty partner, not because they feel some sort of normative obligation.[258] When the treaty sets out clearly what counts as a cooperative action, it becomes more difficult for a state to engage in opportunism then deny that the action violated the requirements of a cooperative game.[259]

We do not have the space to pursue this idea here, and leave it for a future project. We mention this idea only to show how our theory of CIL would cohere with a theory of treaties, the essential point being that like CIL, treaties can emerge endogenously from the rational behavior of states. CIL norms are labels attached to behavioral regularities that emerge in various strategic settings; treaties can be labels attached to certain pronouncements that emerge in various strategic settings. The pronouncements, like behavioral regularities, occur because states believe that they serve their interests.[260] The main difference between the two forms of law is that CIL evolves in the absence of clear and authoritative communication between interested states, which makes it difficult to achieve cooperation or coordination by this means, whereas treaties

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257 Cf. Charles Lipson, Why Are Some International Agreements Informal?, 45 Intern'l Org. 495, 502-08 (1991) (pointing out the disanalogy between domestic contracts, which are enforced by a sovereign, and international treaties, which are not).

258 It is also possible, of course, that a treaty will reflect something approaching a coincidence of interest. See infra __.

259 Lipson has a similar theory, arguing that states enter treaties in order to evidence the seriousness of their claims. He maintains that treaties are more public than informal agreements, so violation of a treaty injures a state's reputation more than violation of other agreements. See Lipson, supra note __, at 509.

260 Setear uses the idea of the repeat prisoner's dilemma to explain treaties. See John K. Setear, An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law, 37 Harv. Inter'l L.J. 139 (1996). Setear's main point is that treaties contain mechanisms that enhances the incentive to cooperate in repeat prisoner's dilemmas.

are a product of authoritative communication and thus are more likely than Cil to produce cooperation or coordination.

C. International Organizations

As the treaty example shows, there are means besides a decentralized customary law to coordinate nations' interests and induce international cooperation. In this century, and especially since World War II, a huge variety of international organizations and related regimes have grown out of multilateral treaties: the United Nations, the World Bank, the International Monetary Fund, The GATT, and on and on. To a much greater extent than lawyers, political scientists have examined the ways that these organizations induce international cooperation.[261] Many political scientists conclude that these organizations can affect international behaviors by generating information, facilitating communication and negotiation, structuring interactions, and providing the institutional mechanisms needed to enforce selective incentives for national action.[262] Others are skeptical. They either doubt that international organizations facilitate cooperation, or they maintain that these organizations exercise no exogenous influence on national behavior, but rather merely reflect underlying national interests and power.[263]

Our analysis has no direct implications for this debate, which has little to do with CIL. Sanguine claims about international organizations can be attacked from a perspective consistent with our theory. For example, Downs, Rocke, and Barsoom argue that there is less international cooperation in international regulatory regimes than meets the eye because the regimes "require only modest departures from what [nations] would have done in the absence of an agreement."[264] In other words, what appears to be compliance might in many circumstances be something approaching coincidence of interest. But claims about the efficacy of international organizations

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261 International lawyers who have drawn on the political science literature in this respect include the Chayes', see Abraham Chayes and Antonia Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1995), and Kenneth Abbott, see Kenneth Abbott, GATT as a Public Institution: The Uraguay Round and Beyond, 31 Brook. J. Int'l L. 31 (1992); Kenneth Abbott and Duncan Snidal, Why States Act Through International Organizations, 42 J. Conflict Res. 3 (1998), and William Aceves, Institutionalist Theory and International Legal Scholarship, 12 Am. U. Int'l L. J. 227 (1997).

262 See Stephen Krasner (ed.), International Regimes (1983); International Organization: A Reader (Friedrich Kratchowil & Edward masfield, eds. 1994); Abbott & Snidal, supra note __; Aceves, supra note __.

263 See, for example, John Mearsheimer, The False Promise of International Institutions, 19 Int'l Sec. 5 (1995); Joseph Grieco, Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism, 42 Int'l Org. 485 (1988).

264 George Downs et al, Is the Good News About Compliance Good News About Cooperation?, 50 Int. Org. 379 (1996).

might also be consistent with our theory of CIL. The theory does not purport to give an exhaustive account of all international behavioral regularities, but rather only those behavioral regularities thought to constitute CIL. Our argument is against the concept of CIL viewed as an independent and exogenous influence on national behavior. We do not claim that it is impossible for nations to facilitate international cooperation, or for nations to create institutions that influence international behaviors.

D. International Human Rights Law

The traditional rules of CIL that we have examined thus far regulate *inter*-national relations. Following the Holocaust, the international community expanded the focus of international law to include governance of the way a nation treats its citizens.[265] Since World War II, nations have signed scores of multilateral human rights treaties that purport to regulate the way they treat their citizens with regard to such issues as genocide, torture, and various civil rights.[266] These treaties are in effect promises by one nation to others that it will protect the human rights of its citizens. And these treaties, in turn, are said to give rise to a flourishing CIL of human rights.[267]

This CIL of human rights differs from traditional CIL.[268] It purports to make individuals in addition to states the subjects of international law. Because many nations systematically and overtly mistreat their citizens, almost all of the CIL of human rights makes no pretense of reflecting a universal behavioral regularity. Instead, it purports to be based on the broad written or verbal assent to human rights norms as reflected in multilateral treaties, General Assembly Resolutions, and domestic enactments. This conception of CIL is even more mysterious and controversial than the traditional conception, because it eschews CIL's traditional grounding in state consent, and replaces it with a vague and easily manipulable consensus criterion. Nonetheless, CIL so conceived is important to the theory and rhetoric of international human rights law, for it purports to impose obligations on nations that have not fully embraced human rights treaties.

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265 On the pre-World War II antecedents to international human rights law, see Louis Henkin, International Law: Politics and Values 169-73 (1995).

266 For an overview, see Richard Lillich & Hurst Hannum, International Human Rights: Problems of Law, Policy and Practice (3d ed. 1995); Human Rights in the World Community: Issues and Actions (Richard Claude and Burns Weston eds., 1989).

267 See Curtis Bradley & Jack Goldsmith, The Current Illegitimacy of International Human Rights Litigation, 66 Fordham L. Rev. 319, 328 (1997).

268 See Curtis A. Bradley and Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 838-42 (1997).

We are once again less interested in the internal logic of the CIL of human rights than we are with the international behaviors associated with it. Recall that the CIL of human rights does not purport to reflect a behavioral regularity among nations. The CIL of human rights thus raises two questions that call for explanation. First, why is there such a gap between what the law purports to require and the actual behavior of nations? (This question is often phrased in terms of international human rights law's poor enforcement record.) Second, what accounts for the fact that some CIL prohibitions -- for example, the prohibition on genocide -- do appear to track a general behavioral regularity?

We begin with the exceptional case, the CIL prohibition on genocide. Some nations in history have committed genocide, but most nations most of the time do not.[269] International legal scholars use this behavioral regularity of not committing genocide, in combination with many pronouncements (including the Genocide treaty[270]), as evidence that nations respect the prohibition on genocide as a legal obligation. As usual, this account is consistent with the appearance of a compliance pattern but cannot explain either violations of the norm or the reason why nations appear to comply with it. A better explanation is that the absence of genocide reflects a coincidence of interest. With notable exceptions,[271] there was a general behavioral regularity of nations not committing genocide both before and after the development of the ostensible international law prohibition late in this century. Most nations lack any reason to annihilate an ethnical, racial, or religious group among its citizenry. And even nations that has reason or interest to commit genocide find it very costly -- in military, economic, or moral terms -- to do so. This is why genocides have been rare throughout history.

This point generalizes. There are an infinite number of ways that nations can abuse their citizens. Nations do not deny speech rights to people who have blue eyes, and almost all nations do not mutilate the genitals of young girls. They do not do so because they have no reason or interest to do so. Following a norm from a sense of legal obligation has nothing to do with it.

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269 For a historical survey, see Frank Chalk and Kurt Jonassohn, The History and Sociology of Genocide: Analyses and Case Studies (1990).

270 See U.N. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277.

271 See Chalk and Jonassohn, supra note __.

Now consider cases in which nations do have a reason to abuse their citizens.[272] Governments often find it useful to torture certain individuals, or to deny to citizens certain civil rights such as freedom of speech. In these and other cases where governments benefit from abusing citizens, a gap exists between what the law purports to require and the actual behavior of nations. The characteristics of this gap between law and practice are consistent with our theory.

We certainly would not expect to see cooperation on this issue. Consider a world of two nations, A which abuses its citizens and B which does not. A gains nothing if both nations agree to stop abusing citizens. The same is true if both A and B abuse their citizens. They lose something and gain nothing from a mutual agreement to provide greater protection to their citizens. Cooperation is obviously no more likely among n-nations. Assuming for the moment an absence of coercion (i.e. selective incentives such as forgone economic aid, threat of military intervention, or diplomatic ostracization), a nation that violates its citizens human rights will have no incentive to comply with more restrictive international human rights norms.

This all suggests that we would expect nations not otherwise inclined to protect human rights to abide by international human rights law only if other powerful nations enforce compliance. Consider the international slave trade. By the end of the nineteenth century, the slave trade had all but died out, and by the middle of the twentieth century it was prohibited by various international treaties. The behavioral regularity of not trading slaves is best explained by the fact that Britain and to a lesser degree the United States developed a national interest in abolishing the international slave trade, and enforced their will with the threat of military force.[273] We need not take a position in the debate whether religious, economic, or other reasons accounted for the British and American governments' decision to ban international slavery.[274] Whatever the reason, the national interest of these two countries changed when their governments decided to ban international slavery, and a new behavioral regularity arose -- according to which states no longer traded slaves -- only because they militarily punished or threatened to punish those states which violated its interest.[275]

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272 We are not suggesting here that human rights abuses are ever morally justifiable. We are simply describing the cases when nations believe that they have reason — on moral, political, economic, or any other ground — to commit human rights abuses.

273 Stephen Krasner, Sovereignty, Regimes, and Human Rights, in Regime Theory and International Relations 139 (Volker Rittberger ed., 1993).

274 For a comprehensive examination of the reasons for the elimination of the slave trade, see Hugh Thomas, The Slave trade 449-785 (1997).

275 Krasner, supra note __.

A similar coercion story explains the patterns of enforcement, and limited efficacy, of modern international human rights law. Consider the position of the United States, the world's leading enforcer of human rights. The United States sometimes has reason -- grounded in domestic political factors and geopolitical concerns -- in reducing a foreign nation's mistreatment of its citizens. But it is very costly for the United States to enforce international human rights, and it tends to do so in two situations that present special enforcement incentives. The first occurs when one nation's human rights violations pose a significant adverse threat to the United States. This explains the United States intervention in the former Yugoslavia (to avoid a broader European conflict) and Haiti (to avoid a domestic crisis in Florida). A second context where we find human rights enforcement is when the federal government receives domestic political benefits from enforcement, and the costs of such enforcement -- in economic or military terms -- are low. Examples of this phenomenon are U.S. economic sanctions against weak and unpopular countries like Cuba and Myanmar. In general, the United States will not enforce human rights if enforcement is costly and the strategic benefits of enforcement are low or uncertain. This explains why the absence of human rights law enforcement against China (a powerful military and economic foe) and Saudi Arabia (an important ally).

This enforcement pattern -- against weak foes but not against strong foes or friends -- is consistent with the claim that the efficacy of human rights law will track the enforcement interests of powerful nations. So too is the fact that the core international human rights, and the ones most widely embraced, mirror the rights protected by the United States Constitution.[276] Also consistent with the coercion story is the fact that at the same time the United States is enforcing human rights law abroad, it is thumbing its nose at international human rights law at home.[277] Although United States domestic law provides abundant protections for human rights, many practices in the United States -- the juvenile death penalty, prison and police standards, and certain immigration acts -- fall below the ostensible requirements of international human rights law.[278] But the United States resists application of this law to itself. It has been slow to assent to human rights treaties, and when it does assent it attaches reservations and declarations that render the assent meaningless.[279] And while United States domestic

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276 See Constitutionalism and Rights : The Influence of the United States Constitution Abroad (Louis Henkin and Albert J. Rosenthal, eds. 1990); Louis Henkin, The Age of Rights (1990).

277 For descriptions of this practice, and different views about its legitimacy, see Jack Goldsmith, International Human Rights Law and the United States Double Standard, 1 Green Bag 2d 365 (1998); Amnesty International USA, United States of America: Rights For All (1998).

278 Amnesty International USA, supra note __,

279 See Amnesty International USA, supra note __; Louis Henkin, U.S. ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 Am. J. Int'l L. 341 (1995).

law permits domestic enforcement of the CIL of human rights law against foreign government officials, it does not permit enforcement of this law against domestic officials.[280] This double standard has been criticized as hypocritical. But as a positive matter it makes perfect sense, for there is no nation able to enforce a more restrictive human rights regime on the United States.

We do not mean to suggest that high-profile military or economic sanctions by powerful governments are the only ways to enforce human rights law. Along many points of diplomatic and economic interaction, more subtle, low-level sanctions can be brought to bear on nations that abuse their citizens. These sanctions are facilitated by the scores of international organizations devoted to exposing human rights abuses and organizing interest groups to encourage powerful nations to enforce human rights. These strategies make a difference, for some nations otherwise inclined to violate international standards do take steps to avoid exposure of illegal acts, and often engage in sporadic and nominal acts of compliance (such as releasing a dissident prisoner or announcing new human rights aspirations). But the difference is usually small. And it is in any event fully explained by sanctions that can be brought to bear on recalcitrant nations rather than compliance with a norm of international law from a sense of legal obligation.

V. Conclusion

Henkin famously stated that "almost all nations observe almost all principles of international law and almost all of their obligations all of the time."[281] If this is true as applied to CIL, it is only because the principles of CIL are *defined* as ones that are consistent with existing international behavior. Courts and scholars describe and generalize what states and courts have done in the past. States and courts have done in the past whatever served their national interest, so they would violate the "principles of CIL" only if they irrationally decide to violate their interests or, more likely, their interests have changed since the cases and actions described by treatise writes. Even then, the states can be said to act consistently with CIL, because current actions can usually be shown to be consistent with earlier actions by reinterpreting the hasty and vague generalizations that jurists and courts make about CIL. Seizing a neutral ship does not violate CIL because of an infinitely expandable exception for "contraband," "continuous voyage," or "blockade." Seizing a fishing vessel does not violate CIL because of the exception for "military necessity" or because of ambiguities regarding the size of the vessel. On the other side, if states in fact do not seize neutral ships or

280 See Goldsmith, supra note __, at 366-369.

281 Louis Henkin, How Nations Behave 47 (2d ed. 1979).

fishing vessels, the courts and scholars triumphantly claim that the state abide by principles of CIL, even though in all likelihood the states would engage in the same actions even if no one had ever heard of CIL.

In our view, CIL scholars approach international law exactly backwards. They think that CIL exists "out there" and states must decide whether to comply with it or violate it. They imagine their task to be discovering what CIL is, in order to determine what states should do. The problem with this view is that one can discover what CIL is only by looking at what states actually do. One evaluates a state's action by looking at CIL, but one determines CIL by looking at states' actions. The circularity of this project can be escaped only by giving precedence to earlier behavior. But the standard account of CIL never explains why the current behavior of states should be controlled by their behavior, or the behavior of other states, that occurred ten or fifty or one hundred years ago.

Far more fruitful, we think, is the approach that we have described in this Article. We start with the assumption that states act in their perceived national interest. This assumption is not unknown in the international law literature. Not all international law scholars are starry-eyed about the motives of the state. Some do believe that self-interested states can cooperate. We agree, but we are also more skeptical and, we hope, more rigorous. Whereas they believe that somehow these self-interested states feels constrained by CIL, we insist that when states do achieve joint gains, and establish behavioral regularities that display law-like patterns, the most plausible explanation can be found in the bilateral coordination and prisoner's dilemma models. We also insist that a careful attention to the historical record reveals that most instances of supposed cooperation or law-like behavior are best explained as coincidence of interest or successful coercion. CIL scholars tend to be too optimistic about empirical reality and too pessimistic about theory. International cooperation, at least as reflected in CIL, is not as robust as they imagine. But it is still possible for self-interested states to cooperate in the absence of external constraints.

Modern CIL scholarship occupies the position that domestic legal scholarship held a century ago. Heavy reliance on cases and treatises gives scholars a distorted picture of actual state practices, and encourages them to dissipate their energies disentangling themselves from the musty threads of doctrine. They occupy a mirror-world in which cases cite scholars citing scholars' citations of cases. Where there is now arid generalization, there should be a disciplined search for hypotheses that can be tested against the facts. A literature built on the foundations of wishful thinking cannot withstand the winds of skepticism. What CIL scholarship needs, three quarters of a

century after a similar development in domestic legal scholarship, is a dose of legal realism.

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