

(6/1/13)

The Chronological Paradox, State Preferences, and *Opinio Juris*

Curtis A. Bradley*

There are two principal forms of international law: treaties, and customary international law (CIL). Although treaties now address many issues previously regulated by CIL, as well as a host of new issues, CIL still plays an important role in supplementing and filling in the gaps of treaties as well as providing norms in those areas of international relations that are still not covered by widely ratified treaties. CIL is regularly invoked by international tribunals and arbitral bodies as well as by domestic courts.

Despite its importance, there has long been uncertainty about how CIL is to be identified. The generally accepted view today among international lawyers and scholars is that CIL consists of the widespread and consistent practices of states that are followed out of a sense of legal obligation.¹ Under this standard view, CIL is conceived of as having two components: an objective, state practice component, and a subjective, sense of legal obligation component. The second component is sometimes referred to by the Latin phrase *opinio juris sive necessitatis*, which translates as “a belief that something is required by law or necessity,” although commentators often shorten the phrase simply to “*opinio juris*.”

The standard, two-component view of CIL has been endorsed by the International Court of Justice (ICJ).² This conception of CIL, however, does not perfectly track the reference to custom in the ICJ’s governing statute. Article 38(1) of the statute lists the sources of law to be applied by the ICJ, and it includes in the list “international custom, as evidence of a general practice accepted as law.” This phrasing is potentially different from the standard view of CIL. Instead of saying that CIL is based on practices and *opinio juris*, it says that international custom is *evidence* of practices and *opinio juris*. Moreover, the phrasing seems to entail only one component—“international custom”—rather than two components as under the conventional view. Some commentators ignore these differences

* William Van Alstyne Professor and Professor of Public Policy Studies, Duke Law School. This paper was prepared for the Summer 2013 Duke-Geneva conference on “The Role of *Opinio Juris* in Customary International Law.” I thank Mitu Gulati for many helpful conversations relating to this paper.

¹ See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 92-93 (2d ed. 2012); 1 OPPENHEIM’S INTERNATIONAL LAW (Robert Jennings & Arthur Watts eds., 9th ed. 1996).

² See, e.g., Jurisdictional Immunities of the State (Germany v. Italy) ¶ 55 (ICJ Feb. 3, 2012) (Judgment); North Sea Continental Shelf Cases, 1969 I.C.J. Reports 3, 44 (ICJ Feb. 20, 1969).

and simply assert that the phrasing articulates the standard view.³ Other commentators acknowledge the differences but attribute them to poor drafting.⁴

I. *Opinio Juris* and the Chronological Paradox

As I will explain, Article 38(1) is not the product of poor drafting. Rather, it articulates a different conception of CIL than the one that is now widely recited, including by the ICJ itself. To understand this point, it is necessary to trace the origins of the *opinio juris* component of the standard view of CIL.

A number of scholars have traced the *opinio juris* component to a French jurist, Francois Geny.⁵ In a treatise first published in 1899, entitled *Methode d'Interpretation et Sources en Droit Prive Positif (Method of Interpretation and Sources of Positive Private Law)*, Geny attempted to distinguish between legally binding custom and mere social usage, and for the former he suggested that one look for “a feeling among the persons who practice it that they act on basis of an unexpressed rule which is binding for them as a rule of law.”⁶ Although Geny was writing about domestic private law, the subjective element of his formulation is similar to the *opinio juris* requirement under what is now the standard view of CIL.

Although suggestions are sometimes made that *opinio juris* has deeper intellectual roots, David Bederman’s book-length survey of the role of custom suggests otherwise. As he explained:

[C]ontemporary public international law’s doctrine of *opinio juris* bears no real resemblance to antecedents in Roman law, canon law, the *ius commune*, or

³ See, e.g., LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 58 (5th ed. 2009) (contending that “the order of words [in Article 38] makes little difference”); DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 15 (2001) (“There are two key elements in the formation of a customary international law rule. They are elegantly and succinctly expressed in Article 38 of the ICJ Statute.”).

⁴ See, e.g., JAMES CRAWFORD, BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 23 (8th ed. 2012) (describing the phrasing in Article 38 as “prima facie defective”); G. J. H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 87 (1983) (noting that “this much criticized formulation has probably contributed to the confusion surrounding custom”); Josef L. Kunz, *The Nature of Customary International Law*, 47 AM. J. INT’L L. 662, 664 (1953) (referring to the “extremely bad drafting of article 38(1)” of the ICJ Statute).

⁵ See, e.g., ANTHONY A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 49 (1971); DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 142 (2010); V.D. DEGAN, SOURCES OF INTERNATIONAL LAW 144 (1997); MALCOLM N. SHAW, INTERNATIONAL LAW 75 (6th ed. 2008); see also Peter E. Benson, Notes and Comments, *Francois Geny’s Doctrine of Customary Law*, 20 CAN. Y.B. INT’L L. 267 (1982) (“Historians single out Francois Geny as the writer whose work crowned the nineteenth century’s analysis of custom and whose ideas were directly incorporated into our approach towards international custom.”). Some writers, however, connect the standard view of CIL either to the German scholar Franz von Liszt (who was a cousin of the famous composer), or the Swiss scholar Alphonse Rivier.

⁶ FRANCOIS GENY, METHODE D’INTERPRETATION ET SOURCES EN DROIT PRIVE POSITIF 248 (2d ed. 1954) (transl. Louisiana State Law Institute 1963).

English common law. . . . It sits as an oddity in the law of nations, and, perhaps is the only thing that distinguishes the exceptional character of CIL.⁷

For example, some commentators have suggested that the *opinio juris* concept finds support in Blackstone’s treatise on the laws of England,⁸ but in fact Blackstone merely argued that customs needed to have a mandatory rather than discretionary character in order to qualify as law, not that they had to be shown to be followed out of a sense of legal obligation.⁹

Importantly, the phrasing of the ICJ Statute appears to have intellectual roots that are distinct from the roots of the modern concept of *opinio juris*. The language of Article 38(1) was carried over from what had been Article 38 of the Statute of the Permanent Court of International Justice (PCIJ). The initial drafting of the PCIJ statute was delegated to an advisory committee of jurists working in 1920, which was chaired by Baron Descamps of Belgium. The committee specifically rejected a proposal by Descamps that would have referred to “international custom, being practice between nations accepted by them as law.”¹⁰ In other words, the committee rejected an approach to CIL that would, like the standard view today, have set forth a separate *opinio juris* requirement.¹¹

The phrasing of the PCIJ Statute’s reference to custom was apparently influenced by the “historical school” of jurisprudence of the nineteenth century, which is generally traced to (among others) the German jurist Friedrich Carl von Savigny. This school hypothesized that customary law emanated from a collective spirit or will of the people—a “*Volksgeist*.”¹²

⁷ DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 173 (2010); *see also* Gerald J. Postema, *Custom in International Law: A Normative Practice Account*, in THE NATURE OF CUSTOMARY LAW: LEGAL, HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 279, 280 (Amanda Perreau-Saussine & James Bernard Murphy eds., 2007) (noting that the “additive understanding” of CIL, whereby *opinio juris* is required in addition to practice, “is of relatively recent vintage”).

⁸ *See, e.g.*, CLIVE PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW 61 (1965).

⁹ *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 78 (1765) (arguing that customs “must be (when established) *compulsory*; and not let to the option of every man, whether he will use them or no”).

¹⁰ *See* Permanent Court of International Justice, Advisory Committee of Jurists, *Proces-Verbaux of the Proceedings of the Committee*, June 16 - July 24 1920, at 306; *see also* BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 129 (2010).

¹¹ *See also* Alain Pellet, *Article 38*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 813 (Andreas Zimmermann et al. eds., 2d ed. 2012) (noting that “the Committee of Jurists in 1920 clearly did not have in mind a splitting-up of the definition of custom into two distinct elements”).

¹² *See* Committee on the Formation of Customary (General) International Law, International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law 32 (2000) [hereinafter ILA Report]; *see also* Raphael M. Walden, *The Subjective Element in the Formation of Customary International Law*, 12 ISR. L. REV. 344, 358 (1977) (“As originally formulated by the adherents of the historical school, the theory of *opinio juris* was intimately connected with their doctrine which saw law as an expression of the *Volksgeist*.”). French legal theorists developed a somewhat analogous idea that custom was evidence of an underlying social solidarity (*solidarite sociale*).

Importantly, Francois Geny—whose writings are said to be the intellectual genesis of *opinio juris* for CIL—expressly disagreed with the Volksgeist concept.¹³

The Volksgeist concept has a natural law character that is probably not viable in today's world of positivism. Not surprisingly, therefore, it has generally been rejected in the post-World War II custom literature.¹⁴ The Volksgeist approach did, however, have one significant advantage over what is now the standard view: it had an answer to the famous chronological paradox that has plagued the standard view of CIL. The paradox is as follows: If state practices do not become binding as CIL until the states involved act out of a sense of legal obligation, how do the states develop that sense of legal obligation in the first place? As one scholar describes the paradox, “Nothing can be a source of new customary international law if *opinio juris* requires that any action must be in accordance with the existing law.”¹⁵

Some commentators who articulate the standard view of CIL either ignore the paradox or treat it as if it were a mere rhetorical question that need not be answered. The *Restatement (Third) of the Foreign Relations Law of the United States*, for example, simply notes:

There have been philosophical debates about the very basis of the definition: how can practice build law? Most troublesome conceptually has been the circularity in the suggestion that law is built by practice based on a sense of legal obligation: how, it is asked, can there be a sense of legal obligation before the law from which the legal obligation derives has matured? Such conceptual difficulties, however, have not prevented acceptance of customary law essentially as here defined.¹⁶

As the legal philosopher John Tasioulas has observed, however, for legitimacy and other reasons, the paradox must be confronted “head-on.”¹⁷

A variety of theories have been proposed to solve the chronological paradox, while retaining the standard view of CIL, but none of them seems to work.¹⁸ Perhaps the most

¹³ See GENY, *METHODE D'INTERPRETATION*, *supra* note 6, at 248; see also Walden, *The Subjective Element*, *supra* note 12, at 358-59 (noting that the modern doctrine of *opinio juris* is not connected to the Volksgeist concept).

¹⁴ See Kunz, *The Nature of Customary International Law*, *supra* note 4, at 664; Alan Watson, *An Approach to Customary Law*, 1984 ILL. L. REV. 561, 566. See also Robert E. Rodes, Jr., *On the Historical School of Jurisprudence*, 49 AM. J. JURIS. 165 (2004) (presenting a more sympathetic account of the historical school but noting that “[e]veryone is polite to [the historical school], and no one explicitly disowns it, but no one really takes it seriously”).

¹⁵ Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 INT'L & COMP. L.Q. 501, 504 (1995). See also, e.g., Walden, *The Subjective Element*, *supra* note 12, at 363 (“It is not possible consistently to maintain at one and the same time both that custom is creative of new law and not declaratory of existing law, and also that it always requires to be accompanied by a belief that the conduct in question is already law.”).

¹⁶ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 1, § 102, reporters' note 2.

¹⁷ John Tasioulas, *Customary International Law and the Global Quest for Justice*, in THE NATURE OF CUSTOMARY LAW, *supra* note 7, at 322.

common theory for how CIL develops despite the requirement of *opinio juris* is that states initially make a mistake and believe themselves to be under a legal obligation even though they are not.¹⁹ There are at least two problems with this “mistake theory.” First, according to most accounts of CIL, in order for CIL to arise, a large number of states need to believe that a practice is legally binding. But, unless there is some reason to think that states (many of which are sophisticated actors) regularly make mistakes and, moreover, make the same mistakes en masse, CIL would rarely, if ever, develop and evolve.²⁰ Second, if one assumes that the subset of states that makes mistakes is the least sophisticated, that means that changes in the law would be driven by the least sophisticated actors, which hardly seems like a recipe for effective and desirable law making.

The approach of the historical school to CIL avoided the chronological paradox by hypothesizing that custom was evidence of something deeper and preexisting. Under that approach, the development of a customary obligation did not depend on nations following a practice out of a sense of legal obligation. Rather, the obligation would exist, and the custom would then arise to reflect it. Savigny specifically recognized the need to avoid the chronological paradox, in critiquing what I have referred to above as the “mistake theory” of *opinio juris*:

[A]ccording to [this idea], the first act must have been induced by the necessitates opinio; consequently if it rests upon an error it must not be of any account at all as to the origination of customary law. The same is true of the second act which now becomes the first and of the third and every following one. The formation of a customary law is hence, unless one of those conditions is given up, wholly impossible.²¹

The approach of the historical school avoided this problem, he explained, because “the rule of law was merely manifested by the custom, not generated by it; consequently in the first

¹⁸ See, e.g., Hilary Charlesworth, *Customary International Law and the Nicaragua Case*, 11 AUST’L Y.B. INT’L L. 1, 9 (1984-87) (noting that the “paradox of the traditional theory of customary international law has never been persuasively resolved”); Kunz, *The Nature of Customary International Law*, *supra* note 4, at 667 (“There is here, certainly, a challenging theoretical problem which, as far as this writer can see, has not yet found a satisfactory solution.”).

¹⁹ See, e.g., G. J. H. VAN HOOFF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 99 (1983). Geny suggested something along these lines. See MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES* 131 (1999).

²⁰ See, e.g., BYERS, *CUSTOM*, *supra* note 19, at 131 (“This [mistake] approach is unsatisfactory because it is inconceivable that an entire legal process . . . could be based on a persistent misconception.”); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1, 32 (1974-75) (“It is stretching credulity to suggest that all the many rules of customary law existing today originating on the basis of such mistakes.”). In addition to the mistake theory, there are a variety of theories about how a custom that is not initially perceived as legally binding might gradually come to be understood that way. The mechanism of this change, however, is not typically specified.

²¹ 1 FRIEDRICH CARL VON SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* 141 (William Holloway transl., 1867).

demonstrable act the *necessitatis opinio*, free of all error, might and must have been present.”²²

There is another important respect in which some of the earlier theories of CIL differed from today’s standard view. Instead of requiring that states believe that a practice was already legally required, some of the earlier theories hypothesized that it was sufficient if states believed that a legal rule in support of the practice was *necessary*. Alphonse Rivier, for example, wrote that “the custom or the usage of the nations is the manifestation of the international juridical consciousness operated by the facts that are continuously repeated *with the sense of their necessity*.”²³ Such an approach might be consistent with the broader phrase *opinio juris sive necessitatis*, the latter portion of which is often omitted in modern discussions of CIL.

II. A State Preferences Approach to CIL

The remainder of this paper briefly sketches an alternate approach to CIL that is both consistent with positivism and addresses the chronological paradox, while also addressing other well-known problems with the standard view of CIL. Under this “state preferences” approach, the application of CIL by an adjudicator involves an effort to determine the preferences of the community of states concerning the norms that should apply even in the absence of a treaty. The past practices of states are highly relevant under this approach, because such practices are often the best evidence of state preferences. Requiring a demonstrated acceptance of a norm over time may be especially important for areas of activity for which the baseline is perceived to be one of freedom of action.²⁴

Importantly, however, specific practice relating to the issue in question is not absolutely necessary under this approach in order for an adjudicator to recognize a CIL rule. Nor is it absolutely necessary that the relevant practices have in the past been followed out of a sense of legal obligation. Rather, under a state preferences approach, a CIL rule can be recognized when it is evident—from state practices, statements, and other evidence—that the rule is something that the general community of states wishes to have as a binding norm going forward.²⁵ Because CIL rules can be identified even before states are acting out of a sense of legal obligation, the chronological paradox is avoided. A state preferences approach also helps address many other conceptual and practical issues surrounding CIL, such as:

²² *Id.*

²³ ALPHONSE RIVIER, *PRINCIPLES DU DROIT DES GENS* 35 (1896).

²⁴ *Cf.* The Case of the S.S. “Lotus” (France v. Turkey) 18 (PCIJ Sept. 7, 1927) (“Restrictions upon the independence of States cannot therefore be presumed.”).

²⁵ For a somewhat similar perspective, see LEPARD, *CUSTOMARY INTERNATIONAL LAW*, *supra* note 10, at 98-99 (arguing that “*opinio juris* be interpreted as a requirement that *states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain state conduct*”) (emphasis in original). See also Jonathan I. Charney, *Universal International Law*, 83 AM. J. INT’L L. 529, 538 (1993) (“Certainly, those searching for norms seek to determine whether states that have expressed interest in a matter have reached consensus on establishing a corresponding norm as law.”); Walden, *The Subjective Element*, *supra* note 12, at 97 (“what is involved may be, not a belief that the practice is *already* legally binding, but a claim that it *ought* to be legally binding”).

Principles and rules. Consider, for example, the difference between CIL supporting a general principle and CIL supporting a specific rule. Sometimes—probably often—there is a generally agreed upon principle but no widespread practice concerning the specific issue, and the decisionmaker must decide whether the principle applies to that specific issue. In that situation, the standard view of CIL seems to offer no help, because there is no state practice directly on point, let alone state practice followed out of a sense of legal obligation. Under a state preferences approach, by contrast, a decisionmaker would be free to apply the principle to the new set of facts.

A good example of the distinction between general principles and specific rules is the famous *Schooner Exchange* decision by the U.S. Supreme Court that is said to be the fount of the international law of sovereign immunity.²⁶ In that decision, the Court had to decide whether to accord sovereign immunity to a French warship. There was little state practice directly on point, so the Court explained that it would be “necessary to rely much on general principles and on a train of reasoning founded on cases in some degree analogous to this.”²⁷ The Court proceeded to invoke the general principle in CIL concerning the “perfect equality and absolute independence of sovereigns” and to invoke by analogy various CIL doctrines, such as the CIL governing head of state immunity and the CIL governing diplomatic immunity. The Court was also aided by the fact that the U.S. government had intervened in the case and expressed support for immunity. Despite the lack of direct evidence of state practice, the Court concluded that there was “a principle of public law that national ships of war entering the port of a friendly power open for their reception are to be considered as exempted by the consent of that power from its jurisdiction.”²⁸ The Court was, in other words, both applying and developing CIL at the same time.

The first violator. Consider also the related problem of the first violator. If a practice is uniform and has no deviations, there may be no opportunity for a sense of legal obligation to develop. When the first deviation occurs, however, the issue of whether the practice is legally binding suddenly becomes relevant. Under the standard view of CIL, the past practice might not count, since it was not necessarily being followed out of a sense of legal obligation. Under a state preferences approach, by contrast, the past practice would be relevant in assessing whether states prefer to have a binding rule governing the issue, and an adjudicator would be open to finding that the first deviation violates CIL.

Mixed motives. More generally, the state preferences account of CIL adjudication avoids artificially excluding state practices from consideration merely because they might be followed for reasons other than a sense of legal obligation. For example, nations presumably follow many customs out of self-interest (and, indeed, one would assume that customs develop because they are generally in the interest of the participants), yet it is unclear why

²⁶ 11 U.S. (7 Cranch) 116 (1812).

²⁷ *Id.* at 136.

²⁸ *Id.* at 145. *Cf. Jurisdictional Immunities of the State*, *supra* note 2, ¶ 57 (“Exceptions to the immunity of the State represent a departure from the principle of sovereign equality.”).

behavior motivated by self-interest should not count when discerning CIL.²⁹ Similarly, nations may follow a custom out of a sense of morality (abolishing the slave trade in the nineteenth century, for example), but, again, it is unclear why that should count against the custom qualifying as CIL, since the law and morality presumably overlap. Finally, many customs described today as CIL are probably followed out of bureaucratic habit rather than a conscious sense of legal obligation, and yet such a state of mind (even though not *opinio juris*) probably is desirable for international law compliance.³⁰

Evidentiary uncertainties. It is also worth noting that the entire concept of *opinio juris* is fraught with conceptual and evidentiary difficulties that could be avoided under a state preferences approach. As Professor Hugh Thirlway memorably observed:

The precise definition of the *opinio juris*, the psychological element in the formation of custom, the philosophers' 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.³¹

Some scholars question whether it is even possible to find *opinio juris* in the pure sense that seems to be contemplated by the standard view.³²

Relevance of treaties. A state preferences approach also helps explain why treaties that do not purport to codify CIL are nevertheless relevant to the identification of rules of CIL, a question that has generated significant debate and uncertainty.³³ Although parties to a treaty presumably have a sense of legal obligation *to the treaty*, it is not clear why treaties show that nations are acting out of a sense of legal obligation *under CIL*. Nevertheless, as Mitu Gulati documents in his paper for this conference, treaties are among the most common evidence cited by courts in support of *opinio juris*. Indeed, in many cases, including many cases decided by the ICJ, they are essentially the *only* evidence cited.³⁴ The explanation, I

²⁹ See George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 571 (2005) (noting that "legal obligation and self-interest are not mutually exclusive categories").

³⁰ See generally ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

³¹ H.W.A. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 47 (1972); see also, e.g., Jorg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems*, 15 EUR. J. INT'L L. 523, 532 (2004) ("[*Opinio Juris*] is the most disputed, least comprehended component of the workings of customary international law.").

³² See, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 475 (2000) ("[T]here is no methodology that has the capacity to determine whether states have, in fact, accepted a norm as law.").

³³ See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 213 (2010); see also Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT'L L. 1 (2010).

³⁴ See Mitu Gulati, *How Do Courts Find International Custom?* (draft). This is not a particularly new phenomenon. See, e.g., R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 275 (1965-66) ("Both multilateral and bilateral treaties are not infrequently cited as evidence of the state of customary international law."). See also Charney, *Universal International Law*, *supra*

would suggest, is that adjudicators use treaties as evidence of state preferences. In many cases, of course, a treaty will reveal only a preference for binding consenting parties, but in some cases a widely-ratified treaty might reveal a preference for a universal, community-wide rule. For this and other evidentiary issues, a state preferences approach unifies the “traditional” inductive CIL with the “modern” deductive CIL.³⁵ Relatedly, it explains why adjudicators seem to use a sliding scale, requiring more evidence of practice when there is less evidence of *opinio juris*, and vice-versa.³⁶ The reason is that both types of evidence are information about state preferences.

Functional considerations. A state preferences approach also helps explain why decisionmakers often take into account functional considerations, such as considerations of efficiency and international comity, when discerning rules of CIL. To take just one of many examples, in the *Arrest Warrant Case* the ICJ relied heavily on functional considerations concerning the ability of foreign ministers to carry out duties on behalf of their states.³⁷ As Professor Kirgis has noted, “[a] reasonable rule is always more likely to be found reflective of state practice and/or the *opinio juris* than is an unreasonable (for example, a highly restrictive or inflexible) rule.”³⁸ Such normative considerations are difficult to reconcile with a purely empirical approach to CIL. But taking account of these considerations makes perfect sense under a state preferences approach. After all, the community of states presumably has a preference for rules that are functionally beneficial and that promote cooperation.

Public goods problems. In addition, a state preferences approach makes CIL much more useful for addressing modern problems. If one thinks of the major international coordination and collective action problems today, such as climate change, global financial stability, and combating terrorism, the standard account of CIL has little to offer, since the nature of these “public goods” issues is such that decentralized state practice is unlikely to arise spontaneously to solve them. But it is conceivable that an adjudicator could find that a CIL rule addressing such problems followed from generally agreed principles and was otherwise consistent with state preferences.

Changes to CIL. Finally, a state preferences approach does a better job than the standard view of explaining how CIL changes. One of the purported virtues of CIL as compared with treaties is that it can evolve in response to changing circumstances, without the need for express negotiations among nations. The assumed mechanism for this change is one that non-international lawyers probably would find quite strange: individual nations are supposed to violate rules of CIL and then hope that other nations will acquiesce in the

note 25, at 537 (noting that the ICJ “rarely presents a documented examination of the actual practice of a broad cross-section of the international community’s members, their opinions on the legal character of the practice, their knowledge of the facts that might produce new law, or their unpublicized opposition to the rule”).

³⁵ Cf. Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757 (2001).

³⁶ See Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146 (1987).

³⁷ See Case Concerning the Arrest Warrant of 11 April 2000, ¶¶ 53-54 (ICJ, Feb. 14, 2002).

³⁸ Kirgis, *Sliding Scale*, *supra* note 36, at 149.

violation.³⁹ It is not clear how this mechanism can work, however, under the standard view of CIL. By definition, the violating state cannot be acting with *opinio juris*; indeed, it is acting with essentially the opposite subjective intent.⁴⁰ As a result, this violating practice should not count as part of the state practice for the new CIL rule, in which case the rule should not be able to emerge. Under a state preferences approach, by contrast, an adjudicator can recognize that the deviation, along with other evidence (such as evidence of changed circumstances), shows that the international community no longer prefers the prior rule.

* * *

There are of course drawbacks associated with acknowledging this quasi-legislative role for adjudicators. Such a role naturally raises questions about the extent to which adjudicators have been properly charged to act in this fashion on behalf of the international community.⁴¹ Questions of judicial authority to develop the law are common in a domestic legal system, particularly in a common law system, but they are more pronounced in the international system that (for the most part) lacks an agreed-upon central judiciary. A significant check on such authority, however, is the ability of states to withdraw (prospectively) from international adjudicatory institutions. Moreover, under the persistent objector doctrine, when a rule of CIL is first recognized, it should not be applied to states that have clearly disagreed with the rule. Although not part of existing doctrine, it might also make sense to allow for subsequent withdrawal rights for certain types of CIL rules.⁴² In any event, states can override CIL rules as between themselves by treaty, as long as the rules do not have the status of *jus cogens* norms.

It is worth emphasizing that the claim here is not only that a state preferences approach is a better theory of how CIL adjudication *should* work. It is also a claim that it is a better description of how it already *does* work in institutions like the ICJ. These institutions may recite the standard view of CIL, but they do not actually follow it in practice. The contention here, therefore, is that even if the state preferences approach raises normative questions, descriptive accounts of CIL, such as the International Law Commission's current project on CIL, need to take account of it.

³⁹ See, e.g., Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 21 (1985) ("Nations forge new law by breaking existing law, thereby leading the way for other nations to follow."); Anthony D'Amato, *The President and International Law: A Missing Dimension*, 81 AM. J. INT'L L. 375, 377 (1987) ("Existing customary law, then, contains the seeds of its own violation; otherwise it could never change itself."); Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 957 (2005) ("[C]ustomary international law is thought to be altered by acts that initially constitute violations of old rules; that is how it changes.").

⁴⁰ See ILA Report, *supra* note 12, at 33 ("[I]t is hard to see how a State, if properly advised, could entertain the belief that its conduct is permitted (or required) by existing law when that conduct is, by definition, a departure from it.").

⁴¹ Cf. EYAL BENVENISTI, SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE 203 (2002) (arguing that the international community accepts a role along these lines for the ICJ in certain types of cases).

⁴² See Bradley & Gulati, *supra* note 33; Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 169-71 (2005).