

STANDARDS AND NORMS IN INTERNATIONAL LAW

The panel was convened at 11:20 a.m., Thursday, April 2, by its Chair, Alan O. Sykes,^{*} who introduced the panelists: Jack Goldsmith, University of Chicago School of Law; Eric Posner, University of Pennsylvania School of Law; and Kenneth Abbott, Northwestern University School of Law.

NOTES TOWARD 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.”¹ Conventional wisdom considers it a pervasive feature of international law and international relations. Governments take care to comply with CIL, and often incorporate its norms into domestic statutes. National courts sometimes 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, or a diminution in international reputation. Legal commentators view CIL to be at the core of the study of international law.

And yet CIL remains an enigma. It lacks a centralized lawmaker, a centralized executive enforcer, and a centralized, authoritative decision maker. The criteria for the identification of CIL are controversial and difficult to specify. The content of CIL is often in the eyes of the beholder and frequently tracks the interests of powerful nations. We lack a convincing account of how particular CIL rules originate. We do not really know why nations comply with CIL. And we lack a good explanation for the many changes in CIL rules over time. There is no convincing positive account of how these changes occur. And there is no convincing normative account of how these changes—which are frequently premised on “violations” of CIL—are consistent with the view that CIL is *law*. Finally, the standard definition of CIL—(1) *custom* (2) followed from a *sense of legal obligation*—raises perennial, and largely unanswered, questions.

This essay sketches the outline of a theory of CIL that sorts out many of these difficulties.² The theory has two features that distinguish it from others. First, it seeks to understand CIL on the basis of rational-choice principles rather than on the basis of notions of legality or morality. Second, it suggests that the prevailing judicial and academic treatment of CIL as a unitary phenomenon is a mistake. The label “CIL” subsumes a diverse group of relations and behaviors that are best analyzed separately.

The Theory

The theory assumes that states act rationally and strategically in pursuit of their perceived self-interest. What scholars call “CIL” are behaviors that may be usefully divided into two categories. The first category comprises behaviors that reflect a state’s self-interest independent of the behavior of other states but which happen to be the same for all relevant states (“immediate self-interest”). The second category comprises behaviors that reflect a

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¹RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

²It is based on Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law* (1998) (unpublished manuscript, on file with the authors).

state's self-interest given that other states engage in the same behavior. CIL is more appropriately used to designate the second class of behaviors than the first.

To illustrate, consider an observation that during a certain period none of the relevant states seize coastal fishing vessels. The first explanation is that states gain nothing by seizing coastal fishing vessels: The diversion of naval resources produces a loss greater than the gain from capturing the fishing vessels. The observed behavioral regularity—not seizing fishing vessels—is best understood not to be an example of CIL, because it does not reflect cooperative behavior. Saying that seizing fishing vessels violates a norm of CIL is like saying that sinking one's own ships violates a norm of CIL.

The second explanation assumes that one state would do best by seizing the fishing vessels of another state but only if that other state did not retaliate by seizing the fishing vessels of the first state. The second-best outcome for the first state is mutual cooperation, according to which neither state seizes the fishing vessels of the other. The third-best outcome is mutual predation, and the worst outcome occurs when the first state refrains from seizing the boats of the second state, but the second state does seize the boats of the first. This last form of strategic interaction is a *prisoner's dilemma*. If the states can solve the prisoner's dilemma, then the resulting outcome—nonseizure of fishing boats—can be considered an instance of cooperation that constitutes a norm of CIL.

States can overcome the prisoner's dilemma in narrow circumstances. As is well known, when the prisoner's dilemma is repeated over an indefinite time, the optimal outcome becomes possible in each round. This assertion is based on several assumptions. First, the players have sufficiently low discount rates: They care about the future relative to the present. *Rogue states*—states controlled by irrational or impulsive leaders, or states with unstable political systems, or states in which citizens do not enjoy stable expectations—have relatively high discount rates. 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. Care should be taken when analyzing the parameters of a game. Norms of war (such as the humane treatment of prisoners) might exist because (1) 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 by killing prisoners) in the expectation that the enemy will do the same; (2) belligerents foresee interaction continuing after the war ends, and fear that “cheating” during the war may invite retaliation after the war; or (3) 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 high discount rates and thus are untrustworthy partners for alliances. 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. Fourth, states must have sufficient information about each other's payoffs and strategies. In the standard models, players have complete and perfect information. Fifth, states 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.

One implication of these five assumptions is that the likelihood of the optimal outcome decreases as the number of players increases. It seems clear as a matter of theory, intuition and evidence that two individuals or states playing a well-defined repeat prisoner's dilemma can sustain the optimal outcome. But theory suggests that a similar game played by many individuals or states will result in suboptimal cooperation. Cooperation can be sustained only if players adopt extreme strategies (such as always defecting if one other player ever defects) that are not observed in the real world. Accordingly, we hypothesize that when multistate behavioral regularities are observed, they are usually due to (1) coincidental self-interest

among all states or (2) bilateral resolution of pairwise repeat prisoner's dilemmas, either among all pairs of states or among at least one pair while all other states acting in immediate self-interest engage in the same behavior.

We use this theory initially to make several positive claims about CIL, based on case studies of the CIL of prize, neutrality, diplomatic immunity and maritime jurisdiction. Several considerations lead us to rely on these traditional CIL examples. First, they are prominent and well-documented instances of CIL. Second, they flourished before World War II. For several reasons, this means they present relatively uncomplicated examples against which to test our theory. They developed before the modern explosion of international organizations that facilitate international cooperation and obscure the independent function performed by CIL. In addition, much of the "new" CIL that has grown up since World War II concerns not *inter*-national relations as traditionally conceived, but rather the way a nation treats its own citizens. This relatively new CIL of human rights involves different sources and a different structure of strategic interaction than traditional CIL.

Our first positive claim is that many behavioral regularities identified as CIL norms by courts and scholars reflect simple behavioral regularities with no cooperative content. For example, the most likely reason that many states did not seize coastal fishing vessels during the late nineteenth and early twentieth centuries is that seizure served no military or economic purpose. Whenever seizure of vessels served a military or economic purpose—as in the case of large commercial vessels or in the case even of small vessels that interfered with military operations—states seized the vessels.

Second, we claim that the behavioral regularities with cooperative content almost always arose in situations that can be modeled as two-state iterated prisoner's dilemmas. The few successful instances of cooperation with respect to fishing boats arose between states of roughly equal power, which had proximate coasts, and had continuing relations. Rules of diplomatic protocol are sustained because a state can retaliate for the abuse of its ambassador by abusing the ambassador of the other state.

Third, the claim that rules of CIL are universally binding has no explanatory force. For example, the ostensible CIL rule that belligerents cannot seize enemy property on neutral ships turns out in some circumstances to be (1) a practice that serves the immediate war-specific necessities and interests of belligerents or, more often, (2) no custom at all because belligerents continue seizing enemy property on neutral ships while purporting to comply with CIL. Similarly, when states are engaged in bilateral relationships with many other states, pairwise behavioral regularities may appear universal, but that is simply because every state's self-interest leads it to the same behavior. Our research has disclosed no instance of true multilateral cooperation described by CIL norms. Scholars who conclude otherwise fail to support their generalizations with evidence of genuine multilateral customs. They instead base claims about the existence of a CIL norm on generalizations from pairwise interactions (and even from mere behavioral regularities) or national pronouncements about the content of CIL which either are contradicted by the state's behavior or are advanced by the state for strategic purposes.

The Origin of CIL Norms

The simple theory explains how CIL norms can be sustained, but it does not explain how they arise. But a few possibilities follow naturally from the theory.

CIL norms 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 zero two states fail to seize each other's fishing boats just because their navies have more valuable opportunities. At time one 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 contrast, if the status quo is that of mutual seizure of fishing boats, it will be much more difficult for a CIL norm 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. (A treaty is more useful for changing the status quo; CIL norms preserve the status quo because the status quo is focal.) The fact that 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 mutually desirable compared to an alternative).

It is not the case, however, that a “neutral” behavioral regularity is a necessary predecessor to a CIL norm. Any focal point can stimulate the emergence of a CIL norm. Suppose that state A and state B face a conflict of interest because of an exogenous change in payoffs. 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 navy. 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 A might simply announce, “We will no longer seize the fishing boats from state B, unless state B seizes our fishing boats.” If state B knows state A's payoffs, it might very well believe state A. 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. An example is President Harry Truman's continental shelf announcement.

Extensions

Our initial analysis of CIL focuses on its essential structure. We extend this analysis in several respects. First, we consider the possibility that states care about a general reputation for conforming with CIL. The most useful approach to understanding reputation is with a signaling model, according to which states engage in costly actions in order to show that they are “civilized,” as opposed to being “rogue states.” Recall that rogue states have unstable political institutions, with the result that citizens or leaders have high discount rates. Signaling models suggest that civilized states engage in actions that rogue states cannot afford to mimic, as a way of demonstrating the stability of their institutions and their reliability in cooperative relationships. One possible example is the practice of sending a head of state to the funeral of the head of a foreign state. This practice is costly, since the head of state has other valuable opportunities; it also produces no material gain for the host state. It is most likely done simply because the head of state wants to show the world that the state's political institutions are stable enough to endure in his or her absence. (States constantly in crisis cannot afford to do this.) Another example is the contribution of a small number of troops to a multinational military action. A final behavior of great importance—states' practice of claiming that they conform to CIL norms even as they