

This Perspective is the second in a year-long series examining international law at the turn of the millennium, in commemoration of the fortieth anniversary of the Virginia Journal of International Law.

Understanding the Resemblance Between Modern and Traditional Customary International Law

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I. INTRODUCTION

Every two hundred years, it seems, the jurisprudence of customary international law ("CIL") changes. Beginning in the seventeenth century, natural law was said to be the source of CIL.¹ Beginning in the early nineteenth century, positivism was in the ascendancy.² The positivist view, according to which CIL results from the practice of nations acting out of a sense of legal obligation, was later endorsed by the United States Supreme Court in *The Paquete Habana*.³ Approximately two centuries after the rise of the positivist view, a new theory is beginning to take hold in some quarters. This theory derives norms of CIL in a loose way from treaties (ratified or not), U.N. General Assembly resolutions, international commissions, and academic commentary—but all colored by a moralism reminiscent of the natural law view.⁴ The Second Circuit's decision in *Filartiga v. Pena-Irala*⁵ is the most famous United States case to embrace this new understanding of CIL.

The significance of this "new" CIL is controversial. Many believe it is incoherent and illegitimate.⁶ Others view it as a happy development for international law generally and—because the new CIL primarily concerns human rights—for world justice.⁷ In this essay we suggest that both critics and proponents of the new CIL proceed from a faulty premise. The faulty premise is that CIL—either the traditional or the new—influences national behavior. In

1. See ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (1958); Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239, 240-47 (1932). For an account of the law of nations prior to the seventeenth century, see NUSSBAUM, *supra*, at 1-83.

2. See NUSSBAUM, *supra* note 1, at 232. The statement in the text is generally true, but of course it glosses over many subtleties. For a fine analysis of these subtleties in the United States, see Douglas Sylvester, *International Law as Sword Or Shield?: Early American Foreign Policy and the Law of Nations*, 32 N.Y.U. J. INT'L L. & POL. 1 (1999).

3. 175 U.S. 677 (1900).

4. See, e.g., LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 37-38 (1995); Jeffrey M. Blum & Ralph G. Steinhardt *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981).

5. 630 F.2d 876 (2d Cir. 1980).

6. See, e.g., G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY (1993); J. SHAND WATSON, THEORY AND REALITY IN THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 79-106 (1999); Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000).

7. See, e.g., Lawrence Lessig, *The Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1796-99 (1997); Blum & Steinhardt, *supra* note 4.

our view, the new CIL is no less coherent or legitimate than the old. But this is not because the new CIL is particularly coherent or legitimate, whatever those terms may mean in this context. It is because the commentators misunderstand how CIL, new or old, operates. CIL, new and old, reflects patterns of international behavior that result from states pursuing their national interests. These interests, along with the relative power of each state and other exogenous features of the international environment, determine which rules of CIL emerge in equilibrium. In both the traditional and new varieties, CIL as an independent normative force has little if any effect on national behavior.

Our argument for these views proceeds in three steps. Part II uses *The Paquete Habana* decision to illustrate problems in the positivist account of traditional CIL. Part III sketches a theory of CIL that avoids the pitfalls of positivism. The theory employs simple rational choice techniques to explain CIL as a result of nations pursuing their self-interest. Part IV uses the theory to show that the new CIL identified in *Filartiga* has more in common with traditional CIL than is commonly thought.

II. *THE PAQUETE HABANA* AND TRADITIONAL CIL

The positivist account of CIL defines CIL as a customary practice among nations that has ripened into a norm that nations follow out of a sense of legal obligation.⁸ The standard definition of CIL has two components. The first is a widespread and uniform practice among nations. The second is the “sense of legal obligation,” often described as *opinio juris* or the “psychological” component of CIL.⁹ *Opinio juris* is the crucial concept; it is the explanation for why a nation acts in conformity with a CIL norm. The idea is that, at least sometimes, nations follow CIL rules even though it is in their interest to violate the rules—in the sense of both immediate and long-term self-interest. If this were not true, there would be no difference between CIL norms and mere “comity” or “voluntary custom.” Traditionalists acknowledge that CIL rules sometimes serve a state’s interest. But they also insist that

8. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 [hereinafter RESTATEMENT]; Statute of the International Court of Justice Art. 38. As mentioned in the introduction, there were traditions prior to positivism. In our analysis we focus only on the tradition that the new CIL seeks to replace.

9. See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 7-9 (1990); ANTHONY A. D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 47-55, 66-72 (1971).

CIL transcends the interests of states, and reflects international obligations that states sometimes obey contrary to their self-interest. Accordingly, states obey CIL not because CIL serves their self-interest, but because they are motivated by a desire to comply with an international norm.

Perhaps the most famous case identifying and applying CIL conceived in this way is *The Paquete Habana*.¹⁰ The case involved a seizure by the United States Navy of a Cuban fishing smack during the Spanish-American war. At the time of the decision, the CIL of prize permitted a belligerent to capture ships and goods at sea during times of war. *The Paquete Habana* held that CIL excluded enemy coastal fishing vessels from this right of capture. Most contemporary commentators agreed with the Court's analysis.¹¹ Although prize law today has little importance, *The Paquete Habana* remains an important international law decision for its illustration of the process by which the fishing vessel exemption ripened from a customary practice into an "established rule of international law."¹² As its prominence in international law casebooks suggests,¹³ *The Paquete Habana* is generally viewed as a "model" of how CIL becomes established.¹⁴

Below we examine the evidence that the Court used to justify its holding. We proceed in three steps. Like the Court, we begin with an examination of customary practice prior to the nineteenth century, the era of an incipient norm. We then examine the nineteenth century evidence that convinced the Court that a CIL norm had ripened. Finally, we consider the influence of *The Paquete Habana* on subsequent practice.

10. 175 U.S. 677 (1900).

11. See 175 U.S. at 701-06 (collecting numerous contemporary sources); Brief for Appellants at 10-36, *The Paquete Habana*, 175 U.S. 677 (1900) (Nos. 395, 396). 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). Cf. L. OPPENHEIM, 2 INTERNATIONAL LAW: A TREATISE 477 (7th ed. 1952) (calling the coastal fishing boat exemption a "general, but not universal, custom in existence during the nineteenth century").

12. 175 U.S. at 708.

13. *The Paquete Habana* is reproduced in nearly all leading American casebooks. See, e.g., LOUIS HENKIN ET AL., INTERNATIONAL LAW CASES AND MATERIALS 58 (3d ed. 1993); MARK W. JANIS & JOHN G. NOYES, CASES AND COMMENTARY ON INTERNATIONAL LAW 66 (1997); BARRY CARTER & PHILIP TRIMBLE, INTERNATIONAL LAW 253 (3d ed. 1999).

14. See JOHN ROGERS, INTERNATIONAL LAW AND UNITED STATES LAW 5-19 (1999).

A. *Practice Through the Early Nineteenth Century*

In *The Paquete Habana*, the Court acknowledged that the fishing vessel exemption was not a norm of CIL at the turn of the nineteenth century.¹⁵ The Court nonetheless examined the prehistory of the CIL norm, as if to claim that the norm was latent prior to the nineteenth century, ready to spring forth when conditions ripened.¹⁶

Beginning in the fifteenth century, pairs of states would occasionally agree not to attack each other's civilian fishing vessels. The Court cited a treaty signed by France and England in 1403; treaties, joint edicts, and mutual understandings between France and the Holy Roman Empire in 1521; and treaties and understandings between France and Holland in 1536 and again in 1675.¹⁷ With one exception, the Court neither discussed whether these treaties were tested by war, nor provided any evidence of state practice pursuant to the treaties. The exception was the 1675 "mutual agreement" between France and Holland.¹⁸ The Court noted that as early as 1681 France stopped complying with this agreement because of what a French writer called the "faithless conduct of the enemies of France."¹⁹

The Court then skipped over a one-hundred-year period to the late eighteenth century. It cited a 1779 French declaration not to seize vessels carrying fresh fish, as well as the release pursuant to this declaration of an English fishing vessel seized in 1780.²⁰ In that same year, however, the English High Court of admiralty issued a standing order concerning procedures for prize captures of fishing vessels.²¹ Nonetheless, the Court noted that England and France "abstained from interfering with coastal fisheries" during the American Revolutionary War.²² The Court did not say why

15. 175 U.S. at 694.

16. This is probably the meaning of the sentence in the opinion, just prior to the analysis of the pre-nineteenth evidence, in which the Court states that it will "trace the history of the rule, from the earliest accessible sources, through the increasing recognition of it, with occasional setbacks, to what we may now justly consider as its final establishment in our own country and generally throughout the civilized world." *Id.* at 686.

17. See *id.* at 687-89. The Court also cites France's apparently long-standing practice of allowing admirals to conclude fishing truces with enemies "provided that the enemy will likewise accord them to Frenchmen." *Id.* at 689.

18. *Id.* at 689.

19. *Id.* at 689.

20. *Id.* at 689-90.

21. *Id.* at 690.

22. *Id.*

they did so—whether, for example, they did so because custom required or just because they had better things to do with their navies.

After citing three U.S.-Prussian treaties that embraced the fishing vessel exemption rule in future wars,²³ the Court moved to the wars of the French Revolution. Following France's Declaration of War in February 1793, England authorized the capture of French vessels and late that year the French National Convention asked the executive to conduct reprisals.²⁴ In 1798, England again authorized the seizure of French (and Dutch) fishing boats, and several fishing vessels were captured as prizes of war.²⁵ One English prize court described the state of the law in 1798 as follows:

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 treatment²⁶

When Britain and France officially stopped seizing each other's fishing vessels at the beginning of the nineteenth century, Britain announced that this 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."²⁷ Although in 1801 the French Council of Prizes released a captured Portuguese fishing vessel, and stated that the capture contradicted "the principles of humanity and the maxims of international law,"²⁸ the British view of early nineteenth century CIL was, as the Supreme Court appeared to acknowledge, a truer description of affairs.²⁹

23. *Id.* at 690-91.

24. *Id.* at 691.

25. *Id.* at 692.

26. *Id.* at 693 (quoting *The Young Jacob and Johana*, 1 C. Rob. 20 (1798)).

27. *Id.* at 693 (quoting 6 Georg Friedrich Martens, *Recueil des Traites* 514 (2d ed. 1817-1835)).

28. *Id.* at 695 (quoting *La Nostra Signora de la Piedad* (1801), 25 Merlin, *Jurisprudence, Prise Maritime* § 3, arts. 1, 3 (5th ed. 1827)).

29. *Id.* at 694 (noting that the fishing exemption rule in the early nineteenth century "may have rested in custom or comity, courtesy or concession.")

Four observations are in order about this pre-1815 evidence. First, the paucity of evidence is remarkable. The Court's analysis focuses on relations between England on the one hand and France (predominantly), Holland, and the Holy Roman Empire on the other. It tells us little about the practice of any other maritime nation during the many wars from the fifteenth century to the nineteenth, wars that include the Hundred Years War, the Thirty Years War, The Seven Years War, the Great Northern War, the various wars between the Ottoman Turks and European powers, and scores of other smaller wars involving naval conflict. In a case famous for its extensive examination of custom, this highly selective survey makes clear how difficult it would be to do the work needed to discover a universal customary practice. It also shows how cautious one must be about generalizing from a limited sample of cases scattered over several centuries. For example, if A and B conclude an agreement in 1450, and A and C have a similar agreement in 1550, it does not follow that all are part of any "implicit" agreement thereafter, especially because the circumstances of A and B's relations inevitably differ from the circumstances of A and C's.

Second, the evidence adduced by the Court has dubious value. The Court relies primarily on states' agreements and announcements, rather than the conduct of their navies. Such evidence might count in favor of *opinio juris*, but it does not—at least on the traditional positivist view—count as custom. The Court offers scattered examples of nations not seizing fishing vessels during wars. But it fails to consider the many reasons, other than compliance with CIL, why a nation might abstain from seizing a belligerent's coastal fishing vessels. Seizing such a vessel is a costly activity in terms of lost opportunities and military expenditures, and it provides the state with relatively little gain. A state's navy often has more valuable opportunities to pursue such as defending the coastline or attacking the enemy's navy. The Court assumes that nations that did not seize the enemy's coastal fishing vessels acted pursuant to CIL. But it might well be that nations did not seize the vessels for the same reason that they did not sink their own ships—they simply had no interest in doing so because the activity was costly and produced few benefits.

This latter conclusion finds support in a third feature of the pre-nineteenth century evidence: Each nation's position on the content of CIL—most notably France's and England's—was tendentious. France, which had a broad fishing coast and a relatively weak

navy,³⁰ consistently used treaties, pronouncements, and non-reprisals to obtain consent to a rule that protected its coastal fishery. England, which had the world's most powerful navy, saw no reason to yield its advantage.³¹ The Court, however, viewed France's support for the fishing vessel exemption in sentimental rather than strategic terms.³² It quoted Napoleon Bonaparte—not someone known for his humanitarian impulses in war, or for his compliance with international law—who piously declared in 1801 that England's attack on French fisherman is contrary "to all the usages of civilized nations . . . even in time of war."³³ Napoleon added that the French would respond magnanimously to the English atrocities, for having always made it "a maxim to alleviate as much as possible the evils of war, [France] could not think, on its part, of rendering wretched fishermen victims of a prolongation of hostilities, and would abstain from all reprisals."³⁴ This is pure propaganda.³⁵

Finally, the *bilateral* nature of the relations the Court examined is noteworthy. All of the treaties, agreements, and conflicts in-

30. On France's weak and largely ineffectual navy during the Napoleonic wars (the period discussed by the Court), see C.C. Lloyd, *Armed Forces and the Art of War: Navies, in THE NEW CAMBRIDGE MODERN HISTORY: WAR AND PEACE IN AN AGE OF UPHEAVAL, 1793-1830*, at 76-80 (C.W. Crawley ed. 1975); W. ALISON PHILLIPS & ARTHUR H. REEDE, *NEUTRALITY: ITS HISTORY, ECONOMICS, AND LAW, VOLUME II: THE NAPOLEONIC PERIOD 24-26* (1936).

31. As two commentators on maritime law during the Napoleonic wars noted in a closely related context, "Great Britain, being in command of the seas, was in general in a position to assert what she claimed to be her belligerent rights, while France, from the first practically powerless at sea, posed as the champion of neutral rights . . ." PHILLIPS & REEDE, *supra* note 30, at 16.

32. See *The Paquete Habana*, 175 U.S. at 688 (noting that "France, from remotest times, set the example of alleviating the evils of war in favor of all coast fishermen").

33. *Id.* at 692.

34. *Id.* at 693.

35. See W.E. HALL, *A TREATISE ON INTERNATIONAL LAW* §148, at 535 (8th ed. 1924). Hall notes that:

Napoleon no doubt complained that the seizure of fishing-boats was 'contrary to all the usages of civilised nations', but as his declaration was made after the English government had begun to capture them on the ground that they were being used for warlike purposes, it is valueless as an expression of a settled French policy; it was merely one of those utterances of generous sentiment with which he was not unaccustomed to clothe bad faith.

PHILLIPS & REEDE, *supra* note 30, at 5 (describing Napoleon's pillorying and confiscation of property in foreign lands, and concluding that "[i]t was this legalizing of the system of rapine by which, first to last, the wars of the Republic and of Napoleon were financed, and which supplies the best comment on the outcry raised by the French against Great Britain for refusing to respect enemy private property at sea 'as we [the French] do on land'").

volve two nations with neighboring or proximate coasts. This is significant for two reasons. First, we might expect the chances for international cooperation to be at its height when only two nations are involved, a point we discuss in more detail below. And yet the Court's opinion makes clear that cooperation in protecting coastal fisheries was rare and fragile before 1815. Second, the Court relies on no evidence that the incipient custom extended beyond the bilateral context. It cites no evidence of treaties or customary practices involving more than two nations. Nor does it cite evidence that third countries protested against, much less retaliated as a result of, a violation of the fishing vessel exemption rule. There may have been isolated bilateral customs; there were no universal customs.

B. *Nineteenth Century Evidence*

We now turn to the evidence that persuaded the Court that by the late nineteenth century CIL had developed to protect coastal fishing vessels.³⁶ England declared in orders in 1806 and 1810 that it would not seize the fishing vessels of Prussia or France, respectively.³⁷ The United States did not seize coastal fishing boats during the Mexican War on the east coast—though it did authorize its navy to capture “all vessels” under Mexican flag on the west coast, with no mention of an exemption for fishing vessels.³⁸ The 1848 Treaty of Peace between the United States and Mexico prohibited the seizure of fishing boats in future wars.³⁹ France ordered 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 significant exception—“unless naval or military operations should make it necessary.”⁴⁰ Moreover, France's ally during the Crimean war, England, destroyed Russian fishing vessels and their accouterments.⁴¹ The Court also noted that during the period 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.”⁴² Finally, the Court sur-

36. 175 U.S. at 696-708.

37. *Id.* at 695.

38. *Id.* at 696-97.

39. *Id.* at 698-99.

40. *Id.* at 699-700.

41. *Id.* at 699.

42. *Id.* at 700.

veyed a large number of commentators, most of whom thought CIL required the fishing vessel exemption rule.⁴³

This is the sum total of the evidence that the Court recounted in support of its conclusion that, by the end of the nineteenth century, the fishing vessel exemption rule had grown “by the general assent of nations, into a settled rule of international law.”⁴⁴ Yet the evidence for this conclusion is weak. A few states announced an intention not to seize the fishing vessels of a few countries during times of war, and other states remained silent on the issue, without “denying” the exemption, to be sure, but without affirming it either. These scattered, untested executory commitments hardly constitute a universal practice followed out of a sense of legal obligation.

The evidence looks even weaker when one considers that the period from 1815 to 1900 was one of relative peace in Europe, and that there were very few naval wars to test the fishing vessel exemption rule. The European wars during this period did not last long, they took place mostly on land, and they did not generally involve the disruption of sea trade in a way that affected maritime rights.⁴⁵ To take a typical example, the Franco-Prussian War lasted only ten months, and France was essentially defeated much sooner.⁴⁶ France’s Navy, which was more powerful than the Prus-

43. *Id.* at 701-08.

44. *Id.* at 694.

45. See John B. Hattendorf, *Maritime Conflict*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 110 (Michael Howard et al. eds., 1994); JOHN W. COOGAN, *THE END OF NEUTRALITY: THE UNITED STATES, BRITAIN, AND MARITIME RIGHTS 1899-1915*, at 21, 25 (1981); MICHAEL HOWARD, *WAR IN EUROPEAN HISTORY* 95-99 (1976); MAURICE PARMELEE, *BLOCKADE AND SEA POWER* 21-23 (1924). 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 1866, 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). The American Civil War involved major sea battles, but the Court offers no evidence about belligerent’s behavior during the Civil War.

46. France declared war on July 15, 1870. By early August, Prussian forces had penetrated deeply into French territory, and in early September, France’s principal army surrendered and emperor Napoleon III was captured. Paris fell in January 1871 (by which time the armies of the French National Defense were largely destroyed), an armistice was declared in late January, a preliminary peace was signed in February, and the final peace treaty was signed in Frankfurt on May 10, 1871. See MICHAEL HOWARD, *THE FRANCO-PRUSSIAN WAR: THE GERMAN INVASION OF FRANCE 1870-71* (1962); A.J.P. TAYLOR, *THE STRUGGLE FOR MASTERY IN EUROPE 1848-1918*, at 206-17 (1954); NORMAN RICH, *GREAT POWER DIPLOMACY 1814-1914*, at 213-23 (1992).

sian Navy, proved “totally ineffective.”⁴⁷ The quick defeats on land meant that many French naval forces never made it to the Prussian coasts, and the ones that did arrive were quickly recalled to France to assist the futile defense of Paris.⁴⁸ In short, the French Navy never had the opportunity to raid Prussian coastal fishing vessels. We have not been able to discover why the French government ordered its navy not to seize coastal fishing vessels at the outset of the Franco-Prussian War. But because the commitment was never tested, the French order should not count as evidence that it was following a norm.⁴⁹

Indeed, what is striking about the Court’s nineteenth century evidence is that during the one war in which the fishing vessel exemption rule was clearly tested—the Crimean War—the rule was violated. As the Court acknowledged, during this war England destroyed coastal fishing vessels in the Sea of Azof.⁵⁰ In this light, the Court’s claim that England did not deny the validity of the fishing vessel exemption rule after the Napoleonic wars means very little, for England did not participate in the continental wars during this period.⁵¹ It never had the opportunity as a belligerent to confront or defend the fishing vessel exemption rule—except, of course, during the Crimean War, when it violated the rule.⁵² It is difficult to understand how the Court can conclude that the fishing vessel exemption rule had grown “by the general consent of civilized nations,” into “a settled rule of international law”⁵³ when

47. PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS* 186 (1989).

48. See HOWARD, *supra* note 46, at 75-76. The French Navy contributed 55,300 officers and men and enormous quantities of equipment trying to avoid defeat on land. See C.I. HAMILTON, *ANGLO-FRENCH NAVAL RIVALRY 1840-1870*, at 314-15 (1993).

49. The Court in *The Paquete Habana* fails to note that Napoleon III’s July 25, 1870, order not to seize fishing vessels was made on the condition that the order “not give rise to any abuse which may prejudice military or marine operations.” See Brief for Appellant, at 29, *The Paquete Habana*, (Nos. 395, 396) (translating FREEMAN SNOW, *CASES ON INTERNATIONAL LAW* 565-66 (1893)). Once again, the exception covers most if not all of the cases in which France might have an interest in seizing Prussian fishing boats. In this light, the order seems emptier yet.

50. 175 U.S. at 699-700. Although the Court does not say so, it also appears that the champion of the fishing vessel exemption, France, seized at least one Russian fishing vessel during the Crimean War. The French Conseil Imperial des Prises rejected the claim that the fishing vessel exemption rule applied to this ship, reasoning “it did not apply to ships *de haut-bord*.” J.H.W. VERZIJL ET AL., *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: THE LAW OF MARITIME PRIZE* 296 (1992).

51. See COOGAN, *supra* note 45, at 25.

52. And of course Russia was in no position to harass allied fisheries hundreds of miles away during the Crimean War.

53. 175 U.S. at 708.

Great Britain—the leading maritime power and the leading defender of the right to attack coastal fisheries—clearly did not accede to the rule.⁵⁴

It is against this background that the Court's lengthy discussion of treatise writers must be considered. The bulk of these writers supported the Court's conclusion about the fishing vessel exemption rule, although many of them—most notably British writers—denied the existence of the rule.⁵⁵ The important point is that, as best we can tell, *the writers added no independent evidence beyond the cases and documents cited by the Court*. It is true, of course, that the “works of jurists and commentators” were a traditional source of CIL.⁵⁶ But as the Court made clear, they were a source only because “by years of labor, research and experience” they had “made themselves peculiarly well acquainted with the subjects of which they treat.”⁵⁷ Accordingly, “[s]uch works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”⁵⁸ Since the scholarly treatises added nothing to the evidence already considered by the Court, the Court, based on its own theory of the treatises' relevance, should have excluded them from consideration, and not counted them as additional evidence for the fishing vessel exemption rule.

Finally, the limited scope of the fishing vessel exemption norm is important. The Court acknowledged that the fishing vessel exemption had exceptions for deep-water or “commercial” vessels, and for vessels seized under conditions of military necessity. This means that the bulk of the cases in which states would have an interest in seizing fishing vessels would be the very cases not covered by the CIL fishing vessel exemption. One would expect states to refrain from seizing vessels that have little economic value (in the first case) or little military value (in the second case), regardless of what CIL says. It is thus no surprise that, as far as we can tell, the exceptions were invoked in all of the cases involving the seizure of

54. *Cf. id.* at 719 (Fuller, J., dissenting) (“[I]t is difficult to conceive of a law of the sea of universal obligation to which Great Britain has not acceded. . . .”). In addition, as the Court notes, many English treatise-writers did not believe the fishing vessel exemption rule was an element of CIL. *Id.* at 705-06.

55. *Id.* at 705-06.

56. *Id.* at 700.

57. *Id.*

58. *Id.* (citing *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215 (1895)).

fishing vessels after the Napoleonic Wars.⁵⁹ Of course, it is possible that there were no other reported prize cases because states followed CIL and never seized “true” coastal fishing vessels. This account is consistent with the absence of seizures. There is, however, no affirmative evidence for either account. We discuss the significance of this fact below.

C. *Early Twentieth Century Practice*

One might argue that the proceeding discussion is beside the point because, as a matter of positive law, *The Paquete Habana* brought the CIL norm into existence. A CIL norm can be said to exist, however, only if it influences the behavior of states in some identifiable way. Although there were many pronouncements supportive of *The Paquete Habana* rule, there is little evidence that the rule itself 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,”⁶⁰ and never, as far as we can tell, as the basis of a decision in a prize case involving coastal fishing vessels. Although this is no doubt due in part to changes in naval strategy and the decline of prize, it does mean that there is no evidence that it influenced U.S. courts. During World Wars I and II, the United States instructed its navy to exempt coastal fishing vessels from capture.⁶¹ We have not been able to determine whether the United States issued this exemption for strategic reasons (to keep the Navy from engaging in unimportant tasks) or to comply with CIL; but there is no reason to think that the United States had any reason to seize coastal fishing vessels during these wars.⁶² In the Korean War, however, “the United States openly flouted

59. The only examples of seizures of nineteenth century coastal fishing vessels that we have found are the British and French seizures in the Crimean War, discussed in Part II.B., *supra*, and the American seizure at issue in *The Paquete Habana*, all of which were justified by their governments on grounds of military necessity. See 175 U.S. at 699-700; Brief for United States at 1-13, *The Paquete Habana* (Nos. 395, 396).

60. *First National City Bank v. Banca Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983); *Prinz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 n.1 (D.C. Cir. 1994).

61. See Scott Stucky, *The Paquete Habana: A Case History in the Development of International Law*, 15 U. BALT. L. REV. 1, 45 (1985).

62. Cf. *id.* at 43, 45 (explaining that long-distance blockades during these wars did not concern themselves with coastal fishing vessels).

The Paquete Habana principle by seizing and summarily destroying all coastal fishing vessels that its forces could capture.”⁶³ During the Vietnam War, U.S. naval forces avoided mining *wooden* coastal fishing vessels, although we have not been able to tell why.⁶⁴

The Paquete Habana also had little influence on national behaviors beyond the borders of the United States. To be sure, the coastal fishing vessel exemption was embraced by the Hague Convention of 1907, where Britain for the first time agreed to the exemption as a legal principle.⁶⁵ And many delegates said the purpose of the exemption was to protect coastal fishing on the humanitarian grounds that it was a small industry and fishermen were poor.⁶⁶ But a careful reading of the text and the delegates’ debates give grounds for skepticism about the delegates’ optimism. During the debates, delegates pointed out that fishing vessels may be used for military purposes: the fishermen might convey information about naval movements to the enemy; the enemy might plant spies or transport contraband on fishing vessels; and the fishing vessels might be used as weapons.⁶⁷ These fears explain the final rule’s limitation to vessels “exclusively” used for fishing. It also accounts for why the rule 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.⁶⁸ In short, the rule adopted at the Hague Convention was

63. *Id.* at 46 (citing authorities also).

64. See Bruce A. Clark, *Recent Evolutionary Trends Concerning Naval Interdiction of Seaborne Commerce as a Viable Sanctioning Device*, 27 JAG J. 160, 175 (1973).

65. See OPPENHEIM, *supra* note 11, at 477-78. The text reads: “Vessels used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo.” 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; and in 3 THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, CONFERENCE OF 1907, at 617 (James Brown Scott ed. 1921) [hereinafter PROCEEDINGS OF THE HAGUE PEACE CONFERENCES]. It should be noted that this provision, like all provisions of the 1907 Convention, were binding only on contracting parties, and only in wars in which all belligerents were contracting parties. See C. JOHN COLOMBOS, A TREATISE ON THE LAW OF PRIZE 22 n.1 (2d ed. 1940).

66. See THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, *supra* note 65, at 956, 1010, 1160.

67. *Id.* at 956-57.

68. As Colombos explains:

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

too narrow and ambiguous to prevent a nation from seizing a fishing vessel when it would have any interest in doing so.

Turning to state practice, treatise writers say that states did not seize fishing boats between 1898 and World War I, as though this showed that states respected the norm. But it does not, because the major European powers and the United States were not at war with each other during that time. The two major wars—the Boer War and the Russo-Japanese War—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. 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.⁶⁹ 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; they did not speculate as to whether the Hague Convention might be binding in other circumstances. There is thus no evidence that either 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 condemned a fishing vessel, holding that the exemption did not apply due to the vessel's size (110 metric tons) and the locations where it had been engaged in fishing.⁷⁰ Although the court cited *The Paquete Habana*, among other cases, as evidence of the fishing vessel exemption's status as a norm of CIL, the court held that the seizure was permitted; the court's reference to *The Paquete Habana* is thus dicta that cannot count as evidence of its influence on state behavior.⁷¹ In *The Marbrouck*, the French

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 contracting powers themselves

COLOMBOS, *supra* note 65, at 147.

69. See *The Michael* (1905), reprinted in 2 C.J.B. HURST & F.E. BRAY, RUSSIAN AND JAPANESE PRIZE CASES 80, 82 (1913); *The Alexander* (1905), reprinted in *id.*, at 86; *The Lesnik* (1904), reprinted in *id.*, at 92-93.

70. See JAMES WILFORD GARDNER, PRIZE LAW DURING THE WORLD WAR 241-43 (1927) (citing II Lloyd 43; I, British & Col. Prize Cases, 29). See also *The Stoer* (1916), reprinted in V Lloyd 18-19 (permitting seizure because coastal fishing vessel not close enough to the coast).

71. Contrary to the assertions in treatises, see e.g., COLOMBOS, *supra* note 65, at 146.

Prize Court held that the exemption did not apply to the vessels in question because they supplied blockaded ports.⁷² We have found no other relevant cases arising from World War I,⁷³ although there is evidence that Germany sank many fishing boats during World War I,⁷⁴ and as many as two hundred fishing vessels during World War II.⁷⁵ We have not examined non-U.S. practice after World War II.

III. A RATIONAL CHOICE APPROACH

If states did not adhere to a fishing vessel exemption out of a sense of legal obligation to a rule of CIL, why did it appear to so many people that they did? To answer this question, one must first distinguish a pattern of behavior and the motives that cause people to act consistently with that pattern. Businesses may offer identical prices and terms for identical services, but their motive for doing so is not a desire to conform to this pattern. Their motive is self-interest; the resulting pattern is due to the dynamics of the market. Businesses that charge too much make no sales; businesses that charge too little do not cover costs. We argue similarly that apparent compliance with a fishing vessel exemption did not result from the motive on the part of states to comply with a norm. The motive was self-interest; the resulting pattern was due to the dynamics of international relations. This section, drawing on earlier work,⁷⁶ sketches a rational choice theory of CIL and applies it to the fishing vessel exemption.

A. *Theory*

At the outset we should be clear on what we mean by “a nation acting in its perceived self-interest.” The concept of a national interest refers to the sum of the interests of domestic individuals and institutions. Identification of the national interest in any particular context is difficult and controversial. For the purpose of understanding CIL, we skirt this difficulty by relying on the assessment

72. See COLOMBOS, *supra* note 65, at 147 (citing *The Marbrouck*, J.O. June 25, 1918, at 5506). See GARNER, *supra* note 70 at 243 n.3.

73. See the brief treatments in GARNER, *supra* note 70, at 241-43; COLOMBOS, *supra* note 65, at 147.

74. See JAMES WILFORD GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* 362 & n.2 (1920).

75. See COLOMBOS, *supra* note 65, at 252 n.1; OPPENHEIM, *supra* note 11, at 478.

76. See Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHIC. L. REV. 1113 (1999).

of the national interest identified by a nation's political leadership. This assumption is far from perfect, but for two reasons it is a fair one.⁷⁷ First, a nation's political leadership "want[s] to stay in power and, being in power, [it wants] to promote the security, prosperity, and values of [its] constituents."⁷⁸ Second, a nation's political leadership almost always determines national actions that comply with or defy CIL.⁷⁹

We now turn to a rational choice account of the behaviors associated with CIL compliance. These behaviors correspond to three basic strategic positions: coincidence of interest, coercion and co-operation.⁸⁰

Coincidence of Interest. Sometimes what appears as acting in conformity with a CIL norm might actually be a *coincidence of interest*. A coincidence of interest is a behavioral regularity that occurs when nations follow their immediate self-interest independent of any consideration of the actions or interests of other nations. Consider the fishing vessel exemption in *The Paquete Habana*. Seizing an enemy fishing vessel is a costly activity in terms of lost opportunities and military expenditures, and it typically provides little gain.⁸¹ Often, therefore, a state acting in its best interest declines to seize enemy fishing vessels simply because its navy has more valuable opportunities to pursue—for example, defending the coastline or attacking the enemy's navy. When this is the case, a belligerent's refusal to seize enemy fishing vessels has the same

77. There is a large and fruitful international relations literature on the relationship between domestic and international politics. For an overview, see Helen Milner, *Rationalizing Politics: The Emerging Synthesis of International, American, and Comparative Politics*, 52(4) INT'L. ORG. 759 (1998).

78. STEPHEN KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 7 (1999) [hereinafter KRASNER, SOVEREIGNTY]. Krasner adds the important caveat:

The ways in which [political leaders] accomplish these objectives will vary from one state to another. Some rulers need to cultivate their military; others seek a majority of votes. Some will enhance their position by embracing universal human rights; others succeed by endorsing exclusionary nationalism. Some are highly dependent on external factors for their financial support; others rely almost exclusively on domestic sources.

Id.

79. For further elaboration of this point, see Goldsmith & Posner, *supra* note 76, at 1168-70.

80. In our more extended treatment, we identified four strategic positions. See *id.* at 1121-28. The fourth—coordination—does not directly apply to the fishing vessel exemption, so we ignore it here except where relevant. See *infra* note 92.

81. Recall that fishing vessels that had strategic significance (such as whalers) did not fall within the exemption.

logical structure as, and is no more surprising than, its refusal to sink its own ships.

Much of the evidence offered in *The Paquete Habana* in support of the fishing vessel exemption rule is best explained as coincidence of interest. For example, the Court makes much of the fact that “no instance has been found in which the exemption . . . has been denied by England or any other nation”⁸² after 1810. This lack of conflict is less significant than the Court thinks, for there were few maritime wars during the nineteenth century in which the rule could have mattered. England, the most ardent critic of the rule, did not fight naval wars during that period except for the Crimean War, and during that war it violated the rule. Because it had no desire or opportunity to seize coastal fishing vessels in the other cases, England’s failure during this period to seize fishing vessels or criticize the exemption cannot count as evidence of adhering to a CIL norm. This point generalizes: a stable pattern of nations refraining from an apparently attractive but conflict-prone activity might be due to the simple fact that the activity is in reality contrary to self-interest. The most plausible explanation for the “pattern” of non-action is that the nations have no reason for engaging in it.⁸³

Sometimes, of course, fishing vessels will be an attractive target because they obstruct a coastline, contain spies or weapons, or are a vital part of the enemy’s economy. A rational choice account would expect a higher likelihood of attack on fishing vessels in such circumstances, because the benefits of seizure are greater than the costs. It is no surprise, therefore, that when nations seize fishing vessels, they often do so for these reasons. But the fact that nations seize dangerous fishing vessels does not mean that they comply with a norm when they fail to seize harmless fishing vessels. They do not seize harmless fishing vessels when seizure produces no benefits.

To bring these points together, consider a passage from Hall, a respected English treatise-writer, on the pattern of “adherence” to the fishing vessel exemption rule:

82. 175 U.S. at 700.

83. Cf. Kenneth Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, in COOPERATION UNDER ANARCHY 7 (Kenneth Oye ed. 1986) (recommending that “[w]hen you observe cooperation, think Harmony—the absence of gains from defection—before puzzling over how states were able to transcend the temptations of defection”).

England does not seem to have been unwilling to spare fishing-vessels *so long as they are harmless, and it does not appear that any state has accorded them immunity under circumstances of inconvenience to itself*. It is likely that all nations would now refrain from molesting them as a general rule, and would capture them so soon as any danger arose that they or their crew might be of military use to the enemy; and it is also likely that it is impossible to grant them a more distinctive exemption.⁸⁴

Perhaps inadvertently, this passage gets the logic of the fishing vessel exemption rule exactly right. England did not attack “harmless” fishing vessels; it had no interest in doing so. Nor did it accord fishing vessels immunity when it was “inconvenient” to do so, such as when the fishing vessels had a military use. *The Paquete Habana* Court and CIL scholars view this pattern as adherence to a fishing vessel exemption norm with an exception for fishing vessels with military uses. The rational choice perspective views it as nations following their self-interest in all circumstances, refraining from seizing ships when there is no advantage in seizure, and seizing when there is a balance of advantage.

Coercion. Coincidence of interest does not account for all behavioral patterns associated with a CIL norm. Sometimes behavioral regularities among nations might arise because a powerful state (or coalition of powerful states) has forced a weaker state to engage in actions that are contrary to the interests of the latter state. Suppose that during the Napoleonic wars, France would have liked to raid English fishing vessels conducting reconnaissance. This action might have been cost-justified (its benefits outweighing its costs) in the absence of an English naval threat to protect the fishing boats. But if England makes a credible threat of protection and retaliation, France’s interest in seizing coastal fishing vessels might prove too costly to achieve, leading France to refrain. If England has no independent desire to seize France’s fishing vessels, a pattern of tolerating such vessels would be sustained. Unlike the coincidence of interest case, where the parties act independently of each other, in the coercion case one party acts because of an implicit threat from the other.

It is worth noting at this point that behavioral patterns resulting from coincidence of interest and coercion have little normative

84. HALL, *supra* note 35, at 536 (emphasis added).

import. Nations that do not seize fishing vessels because of coincidence of interest are like nations that do not sink their own ships. A nation that does not seize an enemy's fishing vessels because of its fear that the enemy will retaliate is like a nation that does not invade an enemy for the same reason. These are not instances of international cooperation, and so labeling the resulting behavioral patterns "norms of CIL" is misleading even if it is tempting to characterize every case where conflict is avoided as a manifestation of international order.

Cooperation. It might be the case that two belligerents, A and B, have an interest in seizing each others' fishing vessels (to disrupt local economies, for example), but both nations would be better off if both refrain from doing so (because, perhaps, both are better off if they preserve their own fishing vessels and forego the expenditure of naval resources in an attack on the other's). The danger for each state is that it might refrain from seizing the other's vessels while the other state seizes its own, leaving the state that refrained worse off than if it had acted aggressively. This is a prisoner's dilemma. Game theory shows that if both states value the future sufficiently, they may be able to cooperate to achieve the outcome of mutual restraint.⁸⁵ This is meaningful reciprocity; each state refrains from seizing fishing vessels because it fears that the other will retaliate by seizing its fishing vessels, and both are made better off by the restraint. Possible examples of cooperation of this sort taken from *The Paquete Habana* include the bilateral treaties and understandings between various pairs of European countries in the fifteenth and sixteenth centuries.⁸⁶

At first glance, cooperation defined as the solution to a bilateral repeat prisoners' dilemma might seem identical to the positivist conception of CIL. After all, states forego acting in their immediate or private self-interest in what appears to be adherence to a norm. There are several problems with this conclusion, however. Most important, the motive is not the desire to comply with a norm; the motive is (long-term) self-interest. As a result, the conditions for cooperation are fragile, or at least more fragile than they would be if states sought to obey norms.⁸⁷ Cooperation can

85. See DOUGLAS BAIRD ET AL., *GAME THEORY AND THE LAW* 165-78 (1994); JAMES D. MORROW, *GAME THEORY FOR POLITICAL SCIENTISTS* 260-79 (1994); Oye, *supra* note 83, at 7.

86. We say these are possible examples because we have actually found no independent evidence that these countries were actually able to cooperate.

87. For further elaboration, see Goldsmith & Posner, *supra* note 76, at 1128-21.

collapse in the face of exogenous shocks (like economic or technological change), high payoffs from defection, misunderstandings about what constitutes cooperation, and changes in the “patience” of the nation, which itself is a function of ever changing internal institutions, leadership, and national character. This is why the possible examples of cooperation on the fishing vessel exemption rule tend to be short-lived and unstable.

In addition, the traditional conception of CIL contemplates *multilateral* adherence to a CIL norm. But the bilateral prisoners’ dilemma cannot, without implausible assumptions, be expanded to a multi-player prisoners’ dilemma, where monitoring and other information costs rise, the incentives for any particular nation to defect from cooperation increases, and the incentives for any particular nation to punish deviation decreases.⁸⁸ These hurdles can perhaps be overcome by the creation of international institutions that diminish information costs and increase the likelihood of sanctions for defection—a possibility on which we take no position.⁸⁹ But such multilateral cooperation is hard to achieve through the decentralized, uncoordinated actions that are said to constitute CIL.⁹⁰ True multilateral cooperation is much more likely to occur, if at all, by a multilateral treaty, where nations can establish clear criteria for cooperation, and establish institutions to monitor compliance and punish deviation.⁹¹ The theoretical difficulty in establishing multilateral customs through decentralized national practice finds support in two features of the historical record recounted in *The Paquete Habana*. First, all of the examples of cooperation—whether by treaty, understanding, or “practice”—occurred in bilateral contexts. Second, the Court cited no evidence that

88. See Oye, *supra* note 83, at 18-20; Michihiro Kandori, *Social Norms and Community Enforcement*, 59 REV. ECON. STUD. 63 (1992).

89. See INTERNATIONAL REGIMES (Stephen D. Krasner ed. 1983) [hereinafter Krasner, INTERNATIONAL REGIMES]; ROBERT KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN WORLD POLITICS (1984).

90. Although political scientists who study international relations focus on treaties rather than CIL, CIL would probably qualify as an international regime, broadly defined as “principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area” of international relations. See Krasner, INTERNATIONAL REGIMES, *supra* note 89, at 2. CIL is significantly less institutionalized than the international regimes typically studied by political scientists, and in general it is too vague, uncertain, and manipulable to serve as a basis for converging expectations except in the weak sense that we describe *infra* pp. 660-62.

91. See Goldsmith & Posner, *supra* note 76, at 1131. Diplomatic immunity might appear to be a counterexample, but as we explain in *id.* at 1151-58, it is not.

third countries protested or retaliated against actions inconsistent with the fishing vessel exemption rule.

In sum, the rational choice approach explains the national behaviors associated with CIL on the basis of power and national self-interest rather than *opinio juris*. It views the behaviors associated with the fishing vessel exemption rule as some combination of coincidence of interest, coercion, and bilateral cooperation.⁹²

B. *Comparison with Positivism*

In comparing the strengths and weaknesses of the positivist and rational choice approaches, it is best to begin by recounting positivism's well known problems.⁹³ The positivist account requires the discovery of a widespread state practice that nations follow from *opinio juris*. But there is much confusion about how much or what kind of state practice counts as evidence of custom.⁹⁴ There is even more confusion about what *opinio juris* means, how it arises, and why it binds.⁹⁵

In addition, the positivist conception of CIL does a terrible job of *explaining* international behaviors.⁹⁶ The positivist account cannot explain why nations violate CIL if they desire to comply with it. Some scholars concede that nations sometimes violate CIL out of self-interest, but these scholars cannot explain why CIL sometimes confines interest and at other times yields to it. Moreover, the positivist account cannot account for the origin of CIL norms, or the evolution of CIL norms. It does not explain where customs come from, or why nations would at some point think that they are "legally obligated" to engage in actions that used to be merely customary.

92. As noted *supra* note 80, our fuller presentation of the rational choice theory of CIL includes a fourth strategic position, *coordination*. See Goldsmith & Posner, *supra* note 76, at 1127-28. In a coordination game each party does better if both coordinate on some action than if they fail to do so. The classic example is driving: both parties do better if they coordinate on passing on the left, or passing on the right, than if they choose different actions. In our more developed account, we argue that international conflict often results from failure to coordinate, and that although bilateral coordination is possible, treaties and other explicit understandings have historically proven more effective at enabling coordination than the decentralized mechanism of CIL. See *id.*

93. See David P. Fidler, *Challenging the Classical Concepts of Custom*, 39 GERMAN Y.B. INT'L L. 198 (1996).

94. See *id.*

95. See *id.*

96. We do not claim that all theorists of CIL would be concerned with the positivist claims outlined in this paragraph.

The rational choice approach to CIL avoids these pitfalls, but forces a redescription of international behavior. In place of *opinio juris*—the question-begging and confused talisman that accounts for why nations “adhere” to CIL—it substitutes the much more familiar and plausible notion that a nation acts in accordance with its interests and resources. From this premise, it provides an account for how what we call CIL arises from anarchy, how and why it changes, and why nations violate CIL.

Consider how CIL originates from anarchy and how it changes. Originally nations might have not seized fishing boats because they lacked the power and interest to do so—a coincidence of interest. As exogenous changes (in, for example, technology, need, and power) make it possible and attractive to seize fishing vessels, the coercion and cooperation stories become more plausible, although coincidence of interest is in our view a generally powerful account of stable behavioral patterns of non-activity. Indeed, when nations face a partial conflict of interest over fishing vessels, a prior coincidence of interest of not seizing fishing vessels might facilitate cooperation by serving as the focal point for what counts as cooperation. The type of ship not seized in the past, for example, becomes the basis of determining whether a seizure, after cooperative relations are established, should count as “cheating.”⁹⁷ There are many variations on this theme.⁹⁸

The rational choice account also better explains “violations” of and “exceptions” to CIL norms. (The traditional account has no explanation at all.) When nations “violate” CIL, this simply means that they deviate from past behaviors because the benefits exceed the costs. Other nations might complain because they have come to depend on the first nation’s behavior, or they believe that the first nation has “cheated” on a cooperative relationship, or

97. The treatment of fishing vessels changed over time, though not in ways and for reasons described in the treatises. The latter nineteenth century saw the increasing industrialization and professionalization of navies. Technology enabled large-scale deployment of ships over vast areas, but successful exploitation of technology required disciplined sailors. The result was the substitution of regular pay and promotions for the traditional method of compensation, the chance of obtaining loot or prize, which would tempt captains to break lines and blockades. Earlier on, fishing vessels were occasionally spared because they were not valuable prizes. They were worth little yet costly to tow to shore. That is probably why the so-called fishing vessel exemption was limited to small ships with perishable cargoes. As time passed, navies sought to discourage ships from pursuing fishing vessels for the sake of prize, and indeed prize was abolished. But navies did not forbid ships from capturing and destroying fishing vessels when there was any military reason for doing so.

98. For elaboration, see Goldsmith & Posner, *supra* note 76, at 1133-35.

simply because they want other nations to believe that the first nation has cheated, whether or not it has. What may give these complaints force is that the earlier behavior was part of a cooperative relationship, or it appeared to be though in fact it was the result of coincidence of interest or coercion. But in any event the "violation" occurs because the costs and benefits have changed.

A similar analysis accounts for the many exceptions to CIL norms (about which, once again, the traditional account has no general account). Consider the exception to the fishing vessel exemption rule for fishing vessels that serve a military or important economic function. This is just the sort of exemption that the rational choice perspective would expect, since the "exception" tracks those instances in which states would have powerful incentives to act. More broadly, a similar analysis explains why we do not see CIL norms that contradict the interests of powerful nations, for a behavioral regularity against these interests would be hard to generate.

The rational choice account of CIL is an improvement over the *opinio juris* account, but it is not without shortcomings. One complaint is that the rational choice account denigrates CIL. It is unclear what this means. If it means that the rational choice approach denies that something other than national interest and power account for the international behaviors associated with CIL, then the complaint is correct. CIL is the label that we attach to certain behavioral regularities that result from nations pursuing their self-interest; it does not cause or constrain anything. If the complaint means that rational choice denies that CIL is law, it is beside the point. The rational choice account seeks to explain accurately the behaviors associated with CIL. Whether CIL is or is not law is beyond its concern. Finally, if the complaint means that rational choice denies the possibility of international cooperation, it is wrong. The CIL of diplomatic immunity appears to be a robust example of bilateral cooperation, and both this cooperation and its exceptions and marginal deviations make sense from the rational choice perspective.⁹⁹ But the rational choice perspective does not view the stable behavioral regularities in the diplomatic immunity and fishing vessel exemption contexts as having the same explanation; the former is probably a prisoner's dilemma, the latter usually coincidence of interest.

99. See *id.* at 1151-58.

Some will object to our failure to take a normative position on the value of CIL. The main problem with international law scholarship, however, is that it is too normative. International law scholars spend too much time proclaiming the value of international law and bemoaning its many "violations," and too little time understanding how international law actually works. In our view the latter inquiry is more fruitful, and international law scholarship would do well to follow the example of international relations theory in political science and focus on positive rather than normative inquiries. Lawyers do not possess the social science skills of political scientists, but they should understand better the way in which legal institutions operate.

We now turn to two genuine challenges to the rational choice account. The first is the continued use by government officials, courts, and scholars of the language of CIL. If CIL is really about power and interest, why does everyone continue to talk as if CIL had independent normative force? Why do nations insist upon, and argue about, particular conceptions of CIL? Why do they complain about violations? There are a number of answers to this hard question. A central part of one answer recognizes the fact that states often share interests, at least partially, and that when this is so, "cheap talk" serves an important coordinating function that can facilitate cooperation.

Suppose that belligerents A and B refrain from seizing each other's fishing vessels because each recognizes that it is better off than it would be if each state preyed on the other's fishing vessels. In this repeat bilateral prisoner's dilemma, cooperation is possible, but it depends crucially on each state having the same understanding of what counts as a "seizure" of a fishing vessel. If A thinks that a fishing vessel is a small boat manned by a few sailors, and B thinks a fishing vessel includes a giant fishing trawler, then when A seizes a giant fishing trawler under B's flag, B will interpret A's innocent act as a violation of the implicit deal not to seize fishing vessels. B might retaliate by seizing one of A's small vessels. A will interpret this act not as justified retaliation but as an unprovoked instance of cheating. Cooperation will break down. But there is another possibility. A and B realize that they might not have the same understanding of the game that they have been playing. Rather than retaliating against B immediately, A lodges an objection, and threatens retaliation unless B provides an explanation. B explains that it was retaliating for A's "violation of CIL," whereupon A argues that giant fishing trawlers are not

“fishing vessels.” Each state appeals to the states’ own earlier interactions, or to the practices of other nations in the present or past, as way of showing that its interpretation is correct and the other state’s interpretation is false. A argues that at no time in the past has the seizure of a fishing trawler been considered a violation of CIL; B responds with evidence to the contrary. Although couched in the language of international law, the implicit assumption is only that past actions may provide evidence of current intentions. Although there is plenty of room for deceit, opportunism, and honest misunderstanding, it is clear that an exchange of meaningful messages about what each state thinks counts as cooperative behavior, even one couched in the talk of CIL, follows from our assumptions about rationality and national self-interest.¹⁰⁰

We have elsewhere called this behavior “casuistry”¹⁰¹ but the term is probably too strong. Casuistry would be a situation in which a nation treated a conflict of interest as through it were a potentially cooperative one. For example, B might sink A’s fishing vessels and then claim they contained spies, even though B knew that they did not, because B does not want neutral state C to think B is an aggressor. Why does B care about what C thinks? The answer is that B might already have separate cooperative relations with C, either by implicit understanding or explicit treaty, or B might hope to establish such relations in the future. As we noted before, cooperative relations can occur within a bilateral prisoner’s dilemma only if each side believes that the other attaches a sufficient value to future payoffs, which is most likely to occur when a state has stable political institutions. B might worry that if C observes B cheat in its relationship with A, C will conclude that B does not attach a sufficient value to the future, and is an unstable and thus untrustworthy partner. The result would be that B’s relations with C would falter. By refusing to admit that it cheated A, B ambiguates its actions, and improves the chances of maintaining cooperative relations with C and other nations. C might be unsure about whether to believe B, but this is better (from B’s perspective) than C knowing that B cheated.

100. For further elaboration of the idea of a coordination problem over which moves count as cooperative moves in a prisoner’s dilemma, see Goldsmith & Posner, *supra* note 76, at 1128.

101. *See id.* at 1135-38.

But in other cases, states communicate truthfully rather than casuistically. They do so because they want to avoid the collapse of cooperation (in a bilateral prisoner's dilemma), as the first example showed, or they want to avoid conflicts in which neither state has an interest in engaging. In short, a nation's self-serving statement of its views about the content of CIL can provide meaningful information that can, in the right circumstances, allow nations to cooperate. In this way, the rational choice account can explain why nations argue about the content of CIL, and why—sometimes truthfully and sometimes not—they claim that they abide by it.¹⁰²

A second objection to the rational choice account—at least as applied to *The Paquete Habana*—is that the Supreme Court in that decision reversed the United States' apparently self-interested action in seizing the Spanish fishing vessels, even though the Navy and the Executive Branch strenuously argued that the fishing boats served a military purpose.¹⁰³ Nothing within rational choice mandates the particular domestic arrangement by which a nation pursues its self-interest in connection with CIL, and it is consistent with the theory that a nation would commit itself to certain courses of action by judicial enforcement. Thus, the Court might simply have been holding the President to his pre-war proclamation that the United States would conduct the war consistently with the "law of nations" and the "present view of nations."¹⁰⁴ But for competence and accountability reasons, we think it likely that most nations would decide that political rather than judicial figures should determine the national interest with respect to CIL. And in fact, United States courts almost always defer to the Executive's view about CIL, and the political branches have the final say about whether and how it applies in the United States, and whether or not the United States will comply with it.¹⁰⁵ Indeed, although the

102. For a different account of this phenomenon relying on the idea of "organized hypocrisy," see generally KRASNER, SOVEREIGNTY, *supra* note 78.

103. See Jordan Paust, *Paquete Habana and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT'L L. 981 (1994); Brief for United States at 5-13. The *Paquete Habana* (Nos. 395, 396).

104. 175 U.S. at 712. Of course, it's our view that the Court misunderstood the "present view of nations."

105. See RESTATEMENT, *supra* note 8, at § 112 & cmt; Philip Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. REV. 665 (1986). As we explain in more detail in Goldsmith & Posner, *supra* note 76, at 1169-70, in the absence of political branch guidance, courts might in effect be deputized to determine the national interest by following reference to custom.

The Paquete Habana Court did not defer to the Executive's views in Court, it did famously state that courts must apply CIL "where there is no . . . controlling executive . . . act,"¹⁰⁶ suggesting that the Court did not believe it was acting contrary to the national interest as officially declared by the President. Nonetheless, *The Paquete Habana* remains an exception to the usual rule of judicial deference to the Executive's views, an exception rarely repeated, especially in cases with more significance than a determination of the validity of the seizure of a fishing smack, a determination that occurred after a one-sided war that resulted in a decisive victory.

IV. THE "NEW" CIL OF HUMAN RIGHTS

In this Section we briefly explain how "new" CIL of human rights, like CIL at issue in *The Paquete Habana*, can be understood through the lens of rational choice. We claim that the rational choice perspective shows that the new CIL does not mark a radical break from the traditional CIL, as it is generally believed.¹⁰⁷

A. Surface Resemblance with Traditional CIL

Beginning with the famous *Filartiga*¹⁰⁸ decision in 1980, a "new" CIL of human rights has developed. *Filartiga* held, among other things, that CIL prohibited state-sponsored torture. The Court acknowledged that this holding was not based on state practice, because many nations of the world torture their citizens.¹⁰⁹ It instead based its holding on the U.N. Charter, the U.N. General Assembly's Universal¹¹⁰ and Torture¹¹¹ Declarations, several human

106. 175 U.S. at 700 (emphasis added).

107. *Filartiga* does mark a radical break from *The Paquete Habana* in one respect: Both decisions applied CIL as domestic law, but they did so for different reasons and with different consequences. The Court in *The Paquete Habana* applied CIL as domestic law in the absence of an authorization from the federal political branches, and the law so applied had the status of pre-*Erie* general common law, not federal law. The *Filartiga* court, by contrast, applied CIL as post-*Erie* federal common law. For the significance of the distinction, see Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

108. 630 F.2d 876.

109. See *id.* at 884.

110. Universal Declaration of Human Rights G.A. Res. 217 A (III), U.N. GAOR 3d Sess., Supp. No. 1, U.N. Doc. A/810 (1948).

111. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment G.A. Res. 3452, 30 U.N. GAOR 39th Sess., Supp. No. 34, at 91, U.N. Doc. A/10034 (1975).

rights treaties,¹¹² and the writings of jurists. *Filartiga* was thought to alter the positivist approach by eschewing close reliance on state practice, and by looking to technically non-legal sources of law (such as unratified treaties and U.N. General Assembly Resolutions) in identifying CIL.¹¹³ Finally, the court's opinion relied on moral disapproval of torture.¹¹⁴ Other national and international courts have in recent years embraced a similar approach to CIL.¹¹⁵

This "new" CIL has been criticized on a number of grounds.¹¹⁶ It fails to reflect state practice, which unfortunately shows widespread human rights violations. The absence of state practice supporting the new CIL means that it lacks a proper pedigree in the consent of states. The content of the new CIL is vague. Moreover, the new CIL is invoked and employed opportunistically. Thus, for example, the United States is famous for its human rights double standard, aggressively enforcing human rights law abroad while aggressively resisting human rights law at home.¹¹⁷

These criticisms of the new CIL are descriptively accurate, but their significance for CIL theory is different from what the critics think. For the identical criticisms can be leveled against the traditional CIL as identified in *The Paquete Habana*. The fishing vessel exemption rule at issue in that case did not reflect universal state practice. The rule lacked a pedigree in the consent of states. In reality it was based on unrelated bilateral agreements scattered over centuries, the writings of scholars (hardly a representative bunch), and the conclusory assertions of a U.S. Court. The fishing vessel exemption was also vague; the line between the rule and its exception for fishing vessels of military or economic value was always unclear. Also like the new CIL of human rights, the fishing vessel exemption was invoked opportunistically in accordance with nations' different interests. The rule was even justified moralistically. On at least eight occasions, the Court in *The Paquete*

112. See, e.g., American Convention on Human Rights, Nov. 22, 1969, 801 U.N.T.S. 101, 9 I.L.M. 673.

113. See *Filartiga*, 630 F.2d at 881-84.

114. See *id.*

115. Two notable cases are the House of Lords recent *Pinochet* decision, see *Regina v. Bow Street Magistrate, Ex Parte Pinochet Ugarte*, 2 W.L.R. 827 (1999) (HL), and the ICJ's *Nicaragua* decision, see *Military and Paramilitary Activities (Nicar. v. U. S.)*, 1986 I.C.J. 14 (June 27).

116. See sources cited *supra* note 6.

117. See Jack Goldsmith, *International Human Rights and the United States Double Standard*, 1 Green Bag 2d 365 (1998).

Habana mentioned the rule as a humanitarian measure designed to protect poor, industrious fishermen.¹¹⁸

B. *A Deeper Resemblance*

The surface resemblances between traditional and new CIL suggest that we should think more deeply about the new CIL of human rights. Let us consider how the subject looks using the three logics that we discussed in Part III.A.

Coincidence of interest. It is likely a coincidence of interest, and not compliance with a norm of CIL, that explains why most nations most of the time do not commit gross human rights abuses such as crimes against humanity. Nations have many good reasons independent of international law (treaty or CIL) for not committing such crimes. It is unattractive and costly to kill people, it disrupts society and the economy, and often there are simply no real animosities among citizens, and thus nothing to be gained from crimes against humanity. When we observe nations not committing crimes against humanity, we might for a variety of reasons label such a behavioral regularity as conformity with CIL. But this does not mean that we witness cooperation or conformity to a norm, or that nations would not commit crimes against humanity if their interests change.

Coercion. In nations not otherwise inclined to protect human rights, a behavioral regularity consistent with human rights law might reflect the logic of coercion.¹¹⁹ Weak state X would, in the absence of external pressure, use torture in order to quell political dissent. Powerful state Y threatens to cut off military and economic aid if X goes down this path. If Y is not otherwise inclined to use torture itself, the result is a behavioral regularity across two states—the lack of torture. But the regularity is the result of Y's independent interest in not torturing its citizens, and its coercion of X, not the result of both countries trying to adhere to a norm.

Coercion of this sort explains some behavior regularities in accordance with the CIL of human rights. But not many. The problem is that nations are not generally inclined to expend military and economic resources to prevent another nation from abusing its citizens. This is why human rights enforcement in nations that do not respect human rights tends to be minimal and tends to reflect

118. See 175 U.S. at 688, 693, 696, 700, 702, 704, 707, 708.

119. See Stephen Krasner, *Sovereignty, Regimes, and Human Rights*, in *REGIME THEORY AND INTERNATIONAL RELATIONS* 139 (Rittberger ed. 1993).

the interests of powerful nations. Thus, for example, the United States redresses the human rights violations in Yugoslavia (where it had a strategic interest in preventing central European conflict and resolving NATO's crisis of credibility and purpose) but it ignores the much greater abuses in Africa (where it lacks strategic interest). It enforces human rights laws against its weak enemies (Iraq, Cuba) but not against powerful enemies (China, Russia) or friends (Saudi Arabia). And while the United States selectively enforces human rights law against the rest of the world, it also ensures that this law has no application to the activities of U.S. officials.¹²⁰ The United States attaches reservations, understandings, and declarations to human rights ratifications to ensure that the treaties require no change in U.S. practice and have no domestic force.¹²¹ And it applies the CIL of human rights against foreign officials but not against its own officials.¹²²

Cooperation. It is possible for two states to cooperate in not abusing their citizens. For example, State A contains a minority of people who have ethnic affinities with the majority of B, and B contains a minority of people who have ethnic affinities with the majority of A. If the majorities in each state feel altruism toward their co-ethnics in the other state, one can imagine the development of a norm of reciprocal tolerance towards the minority populations in both states. Indeed, such bilateral guarantees for minority religious rights occurred in *treaties* throughout the seventeenth and eighteenth centuries.¹²³ Modern human rights treaties—which are multilateral, not bilateral—take the *form* of cooperation. But practice under these treaties—as well as the CIL they are said to give rise to—do not reflect cooperation in practice. There is a large and well known gap between treaty norms and practice in this context. This is unsurprising. Human rights reciprocity is significantly more difficult to achieve in multilateral than bilateral contexts. And absent special circumstances like the minority rights situation, a nation otherwise inclined to abuse its citizens gains nothing from declining to do so in return for a reciprocal commitment from another nation to do the same.

The international human rights regime in Europe reflects a different form of cooperation (although again, this cooperation is by

120. See Goldsmith, *supra* note 117.

121. A typical example is the reservations, understandings, and declarations attached to the International Covenant on Civil and Political Rights. See *id.*

122. See *id.*

123. See KRASNER, SOVEREIGNTY, *supra* note 78, at 81-82.

treaty, not by CIL). The nations of Europe that participated in these regimes were not, when these regimes were established, inclined to abuse their citizens. To the contrary, a “prior convergence of domestic practices and institutions” in support of democracy and human rights was the key to the success of the European system.¹²⁴ The formal international institutions of the European international human rights system fostered cooperation on human rights by creating international institutions that provided monitoring, information, and focal points that assisted domestic governments and groups already committed to human rights protections.¹²⁵ Such genuine cooperation on human rights is possible, but it is unlikely to come about via a decentralized CIL, and more likely to occur by a treaty that creates an on-going institution to provide information and monitoring about nations’ human rights practices.

We do not deny that human rights are more salient today than fifty years ago, or that nations take actions today to redress human rights violations (such as the arrest of Pinochet, or the invasion of Kosovo) that they probably would not have taken fifty years ago. But these facts do not by themselves demonstrate the efficacy of the CIL (or other international law) of human rights,¹²⁶ as there are many other plausible explanations for this phenomenon. Contrary to conventional wisdom, international law has long reflected protections for individuals against the state.¹²⁷ These laws had instrumentalist justifications, sometimes reflecting cooperation, but more reflecting the coercion of powerful nations seeking to promote security or stability.¹²⁸ These latter concerns were made particularly salient by the world wars, and resulted in an expansion of human rights concerns beyond minority rights to individuals generally. In addition, changes in technology have affected the enforcement of human rights. Nations have always been willing to pay, but not willing to pay much, to relieve visible suffering in other countries.¹²⁹ Developments since World War II have increased the benefits and lowered the costs of such enforcement.

124. Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 1(2) EUR. J. INT’L REL. 157 (1995).

125. *See id.*

126. *See* A.M. Weisburd, *Implications of International Relations Theory for the International Law of Human Rights*, 38 COLUM. J. TRANSNAT’L L. 45 (1999) (questioning the relationship between international human rights law and human rights change).

127. *See* KRASNER, SOVEREIGNTY, *supra* note 78, at 73-126.

128. *Id.*

129. For nineteenth century examples, *see id.* at 88-89.

The rise of television means that suffering in other countries has become more visible; ordinary altruists thus gain more by seeing such suffering relieved than in the past, when relief as well as suffering could be described only in print. Advances in military technology have reduced the cost of intervening when human rights abuses occur in poor nations. So too have international institutions that were created to facilitate coordination of security issues, which are also available to coordinate responses to human rights abuse.

This analysis does not deny that citizens of a particular state may feel altruism toward citizens in other states, particularly those that they see suffering on television. Nor does it deny that these feelings of altruism count as part of the national interest and may be reflected in a state's policy. But the state that pursues its interest, so defined, is not motivated by a desire to comply with international human rights law. As we have stressed, the evidence is precisely the opposite. If states sought to comply with international norms, which are inherently universalizing, then they would not enforce human rights selectively. But they do. They incur costs to enforce human rights only when doing so serves their interests, whether that means an interest in promoting stability in strategically important states, or an interest in appeasing the selective altruism of domestic interest groups.

V. CONCLUSION

This article has made a methodological point and a substantive point. The methodological point is that rational choice models provide a fruitful approach to understanding CIL. While we acknowledge that these models have shortcomings, these shortcomings should not blind one to the greater inadequacies of traditional international law approaches. As evidence for our view, we offer the example of the fishing vessel exemption, which should be added to our earlier work on diplomatic immunity, maritime jurisdiction, and the treatment of neutral trade.¹³⁰

The substantive point is not that international cooperation is impossible, but that it occurs only in limited conditions. We have argued elsewhere that many of the behavioral regularities called CIL do not reflect meaningful international cooperation, but rather reflect coincidence of interest or coercion, both of which

130. See Goldsmith & Posner, *supra* note 76, at 1139-67.

lack normative import.¹³¹ Some behavioral regularities associated with CIL (such as diplomatic immunity) do appear to reflect genuine cooperation, although this cooperation has a bilateral structure rather than the multilateral structure assumed by the traditional account.¹³² This paper has extended that discussion to the coastal fishing vessel exemption in the law of prize. There is little evidence that the exemption, whether one wants to call it CIL or not, is the result of international cooperation.¹³³ The bulk of the evidence suggests that nations refrain from seizing fishing vessels when there is no military or economic value in doing so. *The Paquete Habana*, an important casebook symbol of the power of CIL, is a hollow shell.

This brings us to the modern CIL of human rights. We deny that modern CIL differs from old CIL in an important way. The essential difference is content: old CIL focused on commercial and military relationships between states; modern CIL focuses on human rights. But similarities overwhelm this difference. Modern CIL does not constrain nations any more than old CIL did. When nations decline to violate CIL, this is usually because they have no reason to violate it. Nations would act no differently if CIL were not a formally recognized source of law.¹³⁴ Modern CIL is mostly aspirational, just as old CIL was. With old and new CIL alike, nations mouth their agreement to popular ideals as long as there is no cost in doing so, but abandon their commitments as soon as there is a pressing military or economic or domestic reason to do so.

131. *See id.*

132. *See id.* at 1128-33.

133. It is possible that the pre-seventeenth century treaties reflected genuine cooperation. But these were *bilateral treaties*, not universally binding CIL rules.

134. This, in our view, is the proper response to Henkin's famous assertion that "*almost all nations observe almost all principles of international law and almost all of their obligations all of the time.*" LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (1979) (emphasis in original).