

The Chronological Paradox in Customary International Law

(Or, the Virtue of Sloppy Timing in a Messy World)

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ABSTRACT

Customary international law suffers from a problem known as the “chronological paradox.” The orthodox understanding seems to require a state believe a norm *is* the law (*opinio*) for it to *become* law.

Existing approaches to the paradox violate either the law’s created character or its normativity, because they share a commitment to a mentalistic/psychological and descriptive understanding of *opinio*.

We should understand *opinio* as a matter of language, rather than belief. Further, the rule language that constitutes *opinio* should not be understood descriptively but rather as a species of what Austin dubbed *performatives*. Together, these ideas let me analyze the *opinio* element as a matter of moves with a discursive practice. In assessing whether some rule-expression is *warranted*, we look at it the proprieties of the practice, not at an external realm of rules.

International legal discourse is flexible enough to allow rule *change* without paradox because it is a “messy” practice - one in which the propriety of moves is not fully determinate. There is not full convergence on

proprieties amongst its participants, but so long as participants are committed to the practice, they will be able to give and demand reasons for and against particular uses of rule-expressions. A significant section of the essay is taken up in describing how such “messy” disputes can progress in customary law discourse, with particular reference to the debate over NATO’s (putative) humanitarian intervention in Kosovo.

I resolve the paradox neither precisely by solving it nor by dissolving it. The idea that new norms must be rooted in old norms is retained, but in terms of justificatory appeal rather than in terms of belief. I shift terms of the question from “what norms are there?” to “what kinds of justifications can be provided for the use of particular norm-expressions?” The latter question, unlike the former, is answerable. Because of messiness in the practice, it will not often have an *unequivocal* answer, but by way of compensation, there will generally be a lot to say in those situations where the warrant of a rule-expression’s use is in dispute.

Three Dedications

To Melissa, who inspired me to think about the law, who impressed on me the import of the practical, and for putting up with many nights of me turning in at four AM after working on this monstrosity.

To Henry, who unwisely bought me lunch when I started this project, and has since spent more time drinking coffee and hammering out the arguments than he could possibly deserve.

To Raphael Lemkin, who cared enough about international legal discourse to create some of it from scratch.

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First, I would like to thank my dissertation committee: Prof. Henry Richardson, Prof. David Luban, Prof. Mark Lance, Prof. Maggie Little, and Prof. Rebecca Kukla. Without them, this essay would have rambled on about Gadamer for four hundred pages and ended in crayon. Secondly, though it be cliché, I would like to thank my parents, who have supported me in many material, spiritual, and imprudent ways since the point at which I decided spending many years writing this thing would be a good idea. Third, I would like to thank my many colleagues in Georgetown's philosophy department (and one in government), conversations with whom have driven many painful changes in my argument - in particular, I am indebted to Nick Crosson, Jeremy Snyder, Ed Soule, John Gledhill, Jennifer Walter, Matt Burstein, Justin Weinberg, Heath White, Lauren Fleming, Robert Leider, Elisa Hurley, and everyone who has participated in the grad student colloquia and dissertation writers' workshops over the past few years.

There are a number of books and writers that I cannot bear to leave unmentioned. Samantha Power's A Problem from Hell: America in the Age of Genocide inspired my interest in humanitarian intervention. My thinking on law in general has been deeply influenced by the work of the realists and pragmatists, especially Richard Posner's Problems of Jurisprudence and Hans Morgenthau's "Positivism, Functionalism, and International Law" - and more generally by the work of John Dewey, especially his Logic. The idea of the messy practice is in some ways a variation on themes that Judith Butler teases out in her Excitable Speech. And my ideas about the economies of discourses owe much to my readings of Foucault and Gadamer, even if they would not appreciate the translation into analytic philosophy of language.

Finally, it is unlikely that I would have made it through all the writing without listening to copious amounts of Henry Rollins and Bad Religion.

Preface

International law gets a lot of bad press. When we'd like to do something, it is an unwelcome constraint on the rightful pursuit of national interests. When we'd like to see someone *else* do something, it's an airy confection of half-baked aspirations. Both of these complaints get aid and comfort from the theoretical disarray of our philosophical accounts of the law.

Nowhere does international law seem weaker and more confused than in the realm of custom, the inchoate and unspoken law that predates and underlies more explicit treaty rules. Some have claimed that customary law is nonexistent, or nearly so. Others have claimed that it contains all of the most important protections of human rights, already binding in law as well as morality - and much more besides. Mostly, states and theorists claim that it holds whatever they would like it to hold and don't have a handy treaty source for.

The deep problem with custom is that we have no fully satisfactory theory of how we are to determine what rules custom *actually* contains - since it is the creation of states, it is not waiting for us in "legal heaven," but since it is inarticulate and partially non-consensual, we cannot simply ask states what it is. The structure of customary law, the fact that it is both

created through state action and binding on states that do not recognize it, generates several deep epistemological problems.

I would like to take one of them up for a while, and I hope I will be able to shed some helpful light on it. The problem I submit for your consideration is the “chronological paradox:” by the orthodox account, states must act out of a sense of obligation to create new law. But how can they already be obliged by the law they have not yet created?

This paradox is not a mere philosopher’s toy (though it is that). In the first place, the incoherency at the heart of the orthodox account of custom has not gone unnoticed - it has been used by some writers to justify whatever rule seems good to them at the time, and what is perhaps worse, it is taken by other writers to justify total cynicism about customary law, the sneering attitude that states *must* after all only care about what seems good to them at the time since the law is an illusion. An incoherent doctrine will breed contempt for the law, since few agents will feel any loyalty to a system of rules about which there cannot be reasonable debate.

Moreover, I think the incoherency hurts the practical project of law-creation. There are many reasons that we should *want* a robust regime of customary law, such as its potential as a repository of human rights

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protections, but without a workable theory of how it is created, we will not be able to pursue any strategy of development intelligently.

The aim of this particular essay is modest in two respects. First, there are many interesting questions and dusty corners in the theory of customary international law, and while I may mention some of them in passing, I will discuss only the chronological paradox in any detail. Secondly, the kind of questions I hope to answer about the paradox are limited by the philosophical approach I will bring to bear. In particular, I am interested in how (and whether) we can think about custom-formation in such a way that it is possible (of course), is entirely in human hands, and yet leaves custom a continuous practice in which we can meaningfully talk about reasons and requirements. The account I will give tries to explain what it is for customary law to be normative, and what it is for that normativity to change.

As a result of this focus, my account is tangential to a number of serious debates in international legal theory. While I am interested in the ways in which empirical practice interacts with normativity, for instance, I have little to add to debates over effective compliance regimes. And though I will discuss custom as a systemic practice, I will have little to say that will speak directly to the discussions of the intersection between international law and the systems approach to international relations theory. Finally, I will not

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directly propose any substantive improvements in how we identify norms of customary law - in fact, my theory will imply that the process of 'identifying' these norms is more an experimental and creative process than anything that could be codified as a new and better test. However, I hope that my comments on the normative articulation of custom may ultimately be of some use to those approaching customary law from other disciplinary perspectives.

The plan of the essay is as follows: in chapter one, I will discuss some of these general themes in more detail. There, I will explain the structure of customary law in general and of the paradox in particular. Chapter two deals with several explicit - though I believe unsatisfactory - attempts to resolve the paradox, from within natural law and legal realist perspectives.

Chapter three begins my positive account. There, I will argue that the elements of custom traditionally understood as 'psychological' should instead be understood as linguistic. And in chapter four I will explain how looking at those linguistic elements as functional parts of a discursive *practice* lets us understand custom-change in a non-paradoxical way. Finally, in chapter five I will use my model to try to shed some light on a controversial element of customary law, the putative emergence of a norm permitting "humanitarian intervention." There, I will argue that neither its supporters nor its

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detractors are entirely in the right - the norm has yet to take root in custom,
but it is a mistake to insist that there is no room for it there.

That said, please get comfortable, and then let us begin.

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I: Customary International Law and the Chronological Paradox

Introduction

No justice
No justice
Anywhere
Until we put it there
Strike Anywhere, "S.S.T."

Gerald Postema lays out the deepest philosophical problem about the nature of law quite nicely at the beginning of his "Coordination and Convention at the Foundations of Law." Our thinking about law, he says, suffers from a tension between two potentially incompatible, but individually compelling theses:

The Normativity Thesis: Law is a form of practical reasoning; like morality and prudence, it defines a general framework for practical reasoning. We understand law only if we understand how it is that laws give members of a community, officials and law-subjects alike, reasons for acting...

The Social Thesis: Law is a social fact; what is and what is not to count as law is a matter of fact about human social behavior and institutions which can be described in terms which do not entail any evaluation of the behavior of institutions. We understand law only if we understand it as a kind of social institution which can be said to exist only if it is actually in force and directs human behavior in the community...¹

It is easy to suppress one thesis in favor of the other. Maybe law isn't normative at all, but just a system of social control and power. Or maybe we don't create as much of it as we think, and all authority comes from on high. But a theory that lets us hold both theses is the jurisprudential grail, and nowhere is the tension between these two theses more obvious than in

¹ Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J LEGAL STUD. 165, 165 (1982)

customary law. Customary law is made without authoritative institutions, it arises out of practice. So long as we have authoritative institutions, there can be a well-functioning system of laws without anyone losing too much sleep over the normativity thesis. Whether you believe that the judge has the right to sentence you to prison or merely the power is an academic question - either way, you go to jail. But in a customary realm, where there are no authoritative institutions of adjudication and enforcement, the effectiveness of a system depends on the potential for its participants to understand it as both social (so they can identify its norms) and normative (so they take themselves to have an obligation to obey them).

The most general sort of theory of customary law would explain to us how practices can generate genuinely new normative material. That is, how we humans can, through our states and international institutions, create new values in the legal world.

A *completely* general theory of that sort would be beyond the scope of this brief essay. I will instead deal only with one problem that arises for such a theory, what has been called the "chronological paradox." How, in a practice like customary law - a practice in which no one is explicitly empowered to *change* the norms - can the norms in fact change? The air of paradox comes from the apparent need for *new* norms to at the same time be subject to *old* norms. In the next few sections, I will explain customary law,

especially customary *international law*, in more detail, and make the paradox more precise.

What is Customary International Law?

Arthur's next question about the planet is very complex and difficult, and Zaphod's answer is wrong in every important respect.

- Douglas Adams, *The Hitchhikers' Guide to the Galaxy*

So what *is* customary international law (hereinafter, CIL)? In answering this question, I am writing primarily with philosophers in mind, who may not have any legal training. However, the nature of CIL is not a completely uncontroversial topic, even among lawyers.

Let us approach the problem in pieces. The question of what *law* in general is, is well beyond my powers to answer. Much of what I *do* have to say about law, and practices involving rules more generally, will need to wait until later, specifically chapter four.

International, in the legal context, can also open up a number of cans of worms that I am going to leave closed - regarding issues of jurisdiction, precedence, agency, and the like. I am afraid I must leave the notion of 'international' law at a relatively intuitive level. I will deal rather loosely with questions that many international lawyers spend a good deal of time on, such as whether the 'law of nations' and modern 'international law' are the

same thing, whether non-state-actors ought to be granted legal standing and responsibilities, etc. Instead, I will rely on a straightforward understanding of 'international' law as the law that governs relationships between state (in an intuitive, everyday sense of 'state') actors.

Which leaves *customary*, the heart of my problem.

Customary law, generally and not just internationally speaking, is that body of rules that derives its content and power from what 'one does.' Consider, as an analogy, social mores and rules of etiquette. It's very warm out as I write this, but I am nonetheless wearing shorts and a T-shirt. I would probably be more comfortable were I to head out to work in just my boxer shorts - but most people would say that I was doing something *wrong* were I to do that. What? There is no obvious moral argument against it - people might be made uncomfortable, but their discomfort would *derive* from my violation of social norms about clothing. If their discomfort is groundless, then it is not clear that I have moral reason to concern myself about it. Practical concerns are, *ex hypothesi*, against my wearing clothes. There might be places I could go where it would be illegal to walk around in my underwear, but I don't think that the bulk of people's reaction would be a horrified gasp that I was violating the *law*. It is hard to escape the thought that the reason I don't

walk around in my underwear is that “one simply *must* wear clothes when one is in public!” How to understand change and development in such bodies of rules will be a central theme of this essay.

When most people think about international law, they think of treaties, or maybe UN resolutions (especially those passed by the Security Council).² Treaties seem to form the core of international law; since there is no international legislature, states must make laws amongst themselves through treaties. International relations is basically a state of anarchy (so the general picture goes), and so the only legal obligations that can exist are the ones that particular states voluntarily undertake with other states.

This is a widespread impression, but treaties are really only part of the picture. In the first place, treaties are a rather awkward means of regulating society. Imagine, for instance, if we tried to run our nation purely on explicit agreements between individuals.³ You would have to negotiate contracts for a myriad of services we currently take for granted: you’d have your Raytheon

² Actually, UN general assembly resolutions are law only indirectly at best, and Security Council resolutions are actually binding because of states’ *treaty* obligations to the UN charter; so, I’m going to leave them aside. There has long been some support for considering general assembly resolutions at least subsidiary sources of law, but this is far from the settled (or even dominant) opinion. Judge Ammoun seems to support this view in his separate opinion in the *Barcelona Traction* case, for instance. See *Barcelona Traction, Light, and Power Company, Limited (Belgium v. Spain)*, 1970 I.C.J. 3, at 303 (Feb. 1970) (separate opinion of Judge Ammoun); cited in 6 EDVARD HAMBRO ET AL., *THE CASE LAW OF THE INTERNATIONAL COURT* pt. A, at 159.

³ I am not trying to stack the deck against libertarians, contractarians, etc. Even these theorists do not typically envision society being structured entirely by *explicit* agreement (and pure anarchists tend to accept the awkward consequences of their views).

rogue state insurance, your private fire protection contracts, and you could probably forget about anything as cooperation-dependent and capital-intensive as interstate highways. Obviously, international law partakes more of this disorganized structure than most national laws, but there is reason to hope that it is not *entirely* particularistic. Secondly, the very validity of treaties rests on a norm - *pacta sunt servanda* (roughly, "agreements must be kept") - that is not itself *purely* a treaty norm, though it is enshrined in treaties. Nor could it be (ultimately), because then one could ask where the rule was that commanded fidelity to that treaty... and we would either find ourselves in a vicious regress, or admitting that treaties could not be the *sole* source of legal authority. Finally, even aside from these in-principle problems, there are a number of norms that people (not everyone, but many people - this is part of the problem, of course) accept or insist on as part of international law, but which are not treaty rules.

The most orthodox statement of the sources of international law is found in the statute of the International Court of Justice (ICJ), which recognizes four sources of international law, of which treaties are only one:⁴

⁴ It should be kept in mind that the ICJ statute is not usually regarded as creating or otherwise initiating these sources of international law. For instance, in the International Law Commission's first year of meetings in 1949 (at the birth of the ICJ), the topic of customary law was discussed with an eye towards "making the evidence of customary international law more readily available," and debates over the value of customary law were generally over its *existing* role in the international legal system (e.g., its role in colonialism). See *Summary Records of the 32nd Meeting*, [1949] Y.B. Int'l L. Comm'n, at 231-233, U.N. Doc.

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁵

Strictly speaking, (d) is not a *source* of international law. Previous decisions (international law does not recognize a doctrine of *stare decisis*) and scholarly writings cannot *create* law - they are 'subsidiary' means for determining the law. All this really means is that judges of the ICJ are encouraged to look to decisions (whether of the ICJ, other international tribunals, or national courts) and scholarly writings for guidance as to how to interpret difficult cases or points of law. Neither previous decisions, nor (of course) outside publicists' teachings have any *binding* force on international arbitration. Essentially, they can illuminate the reasons for deciding one way or the other, but are not themselves reasons - similarly, the fact that four out of five dentists trust the cavity-fighting power of toothpaste X is not itself a reason to buy it; rather, I trust that dentists know what they are talking about

A/CN.4/SER.A/1949. Rather, the ICJ statute was written so as to recognize what were taken to be *actual* sources of law, many of which were respected by predecessor organizations such as the Permanent Court of International Justice (PCIJ, see, for instance, the discussion of the PCIJ's *Lotus* case, below). The ICJ statute is just regarded as a particularly authoritative statement on what the sources are, not itself a meta-source of law.

⁵ *Working Paper by Manley O. Hudson, Special Rapporteur*, [1950] 2 Y.B. Int'l L. Comm'n, at 24, U.N. Doc. A/CN.4/SER.A/1950/Add.1 (57.V.3).

(when it comes to teeth), and so buy brand X *because of its presumed cavity-fighting power*.

Treaties are covered by (a). Most people, when they think of treaties, think of *bilateral* ('particular') treaties, agreements between two states. There are also *multilateral* ('general') treaties, which any number of states may sign on to and become bound by the provisions of. Examples of multilateral treaties include the UN charter, the infamous Kellogg-Briand Pact, the Geneva Conventions, the WTO (world trade organization) statute, and the CEDAW (convention on the elimination of all forms of discrimination against women). Multilateral treaties offer signatories certain benefits (peace and security, preferential trade agreements, etc.) in return for accepting certain burdens, and they are typically open to any nation that would like to sign. Often, multilateral treaties operate by creating international organizations (like the UN, or the International Aviation Association) which signatories agree to support and treat as authorities. But what characterizes all treaties is that they are binding *only* on nations that explicitly choose to sign and ratify them.⁶ They are 'expressly recognized' by states.⁷

⁶ Unless they generate independent customary law. On this issue, see chapter five of ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 103-68 (Cornell UP 1971)

⁷ The reference to 'contesting' states is there because this is part of a *court's* statute, not merely a statement of the sources of law (though it is often used as the latter). The ICJ statute is directly concerned not with international law in general, but with the rules of international law applicable to the parties to a dispute that comes before it.

The 'general principles' referred to in (c) are the source of much controversy into which I shall not enter. International lawyers tend to polarize into two rough camps over this issue. Natural lawyers read (c) as enacting much of political morality as it applies between states into international law. Lawyers of a more positivistic bent (who do not think this clause is entirely empty) tend to regard (c) as encompassing 'structural' rules of international law - one common use of (c) is to determine procedural rules (as opposed to substantive rules governing offences and the proper conduct of states) of the ICJ by reference to common national procedures. This is the approach of the U.S.' International Law Commission, for instance: "It has become clear that this phrase [i.e., "general principles of law recognized by civilized nations"] refers to general principles of law common to the major legal systems of the world."⁸ It is the rationale, e.g., for adopting a principle restricting double jeopardy (*ne bis in idem*) in international law.⁹

Which again leaves us with "international custom" and "practice," the subject of (b). "Practice" can be used in at least two ways - to refer to the set of rules that define some phenomenon, or to the phenomenon that is bound by some set of rules (so we say both, "chess does not permit castling after the king has been moved" and "chess is no longer as popular as it once

⁸ 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 rep n.7 (1987)

⁹ I am indebted to Prof. David Luban for clarifying this point for me.

was"). "Practice" in the ICJ statute seems to be intended in the latter sense, that of a realm of behavior; the actual practice of nations is supposed to make some genuine contribution to the content of customary law. But custom is not supposed to be whatever states agree to at any moment - whether the source of its normativity is in tacit consent, prior consent, natural morality, or elsewhere, customary law is intended to be opposable to states that dispute its content, applicability, or binding force in any particular case.¹⁰

Let me approach the issue of describing custom by first stepping back to the general idea of customary law. Hart's influential positivist legal theory relies on the notion of customary, unstated 'rules of recognition' that let us identify enacted law. All there is to law, say the positivists,¹¹ is the law we create. But we need to identify who enacts law (and how), and enacting more laws to tell us this invites infinite regress (much as would writing treaties making treaties binding). So the ultimate foundational rules of any

¹⁰ "...[custom] is generally regarded as having universal application, whether or not any given state participated in its formation or later 'consented' to it." (D'AMATO, *supra* note 6, at 4). For instance, in the *North Sea Continental Shelf Case*, the ICJ declared its task to be determining whether the Federal Republic of Germany was bound by customary law on the extent of its continental shelf, since such a law "... like other rules of general or customary international law, is binding on the Federal Republic automatically and independently of any specific assent, direct or indirect..." *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark/Federal Republic of Germany v. Netherlands) 1969 I.C.J. 3, 29-30 (Feb. 1969); cited in HAMBRO, *supra* note 2, at 89.

¹¹ Roughly speaking. A fuller discussion of positivism can be found in chapter 2 of this essay.

legal system must be (as Hart correctly conceives them) something like customary rules: "... the practice of judges, officials, and others... [is that] in which the rule of recognition consists..."¹²

A concrete example of an almost wholly customary system of law can be found in the traditional "law merchant," the body of rules that has arisen from mercantile practice (of course, like much international practice, mercantile practice is increasingly bound not only by custom but by explicit conventions and formal oversight bodies such as the WTO). By medieval times, commercial adjudicators were commonly called in to resolve merchant disputes, and they took judicial notice of the general custom of mercantile practice.¹³ Since the twelfth century, the law merchant has served as a system of relatively stable and universal rules that businesses can rely on despite variations in local legal systems.¹⁴ But by its very nature, it cannot find its source in a legislative body (there is no political organ to which all businesspeople submit), and so must draw its content from prevailing businesses practices. The law merchant is simply the (quasi)legal formalization of what merchants in fact do.

¹² H.L.A. HART, *THE CONCEPT OF LAW* 109 (Penelope A. Bulloch & Joseph Raz, eds., Clarendon Press 2d ed. 1994).

¹³ LEON E. TRAKMAN, *THE LAW MERCHANT* 13 (F.B. Rothman 1982).

¹⁴ *Id.* at 8.

On the international plane, customary law comprises all the various behaviors of states and rules of interstate interaction that have accreted over the years and to which it seems appropriate to give legal expression. Some of these are structural or procedural rules, such as rules about how treaties are to be interpreted (without which rules, of course, the more prominent treaty law could not stand). There *is* treaty law on this issue (the 1969 Vienna Convention on the Law of Treaties). But there is a general consensus that at least *some* rules of treaty-interpretation are binding on nations (such as the U.S., as of this writing) that are not parties to the treaty (for instance, the requirement that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty...”¹⁵). And, of course, were there not rules binding on interpretations of the Vienna Convention, it would be useless (a moment’s reflection will reveal that treaties on how to read treaties invite as much regress as treaties on why to follow them, since the guiding treaties could be read perversely). Other rules are ones that are judged so important, or so expressive of the international rule of law, that they bind any state that does not wish to be an international pariah, regardless of whether or not they have signed any treaties to that effect, and have binding force even in circumstances where the treaty does

¹⁵ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, §3 Art. 31.1

not. So, for instance, even though the ICJ agreed in the *Nicaragua* case that it could not (because of the U.S.' multilateral treaty reservation to the jurisdiction of the court - the details of which need not detain us here) criticize the U.S. for violating the non-aggression norms included in the UN Charter, the Charter of the Organization of American States, the 1933 Montevideo Convention, and the 1928 Havana Convention, it could still hold the U.S. accountable for violating norms with the same content that also existed as customary law.¹⁶ The general sentiment expressed in the decision was that the norms preventing aggression are so fundamental and widely accepted that their force is not exhausted by treaties. Through their practice and statements, nations have built up a practice, a network of relationships that obeys certain rules crucial to maintaining the character of civilized international relations. These rules comprise customary law.

Legal writings on customary law tend to focus on how to determine what the specific norms of customary law are, rather than on understanding what the nature of those norms is. This can, unfortunately, make the

¹⁶ "The Court cannot dismiss the claims of Nicaragua under customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law..." *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1984 I.C.J. 392, 424 (Nov. 1984) (Jurisdiction of the Court and Admissibility of the Application)

philosopher's task difficult. It does point out the direction that any philosophical consideration must take, though.

Notice that the four sources cited from the ICJ statute, above, are all couched in epistemological rather than metaphysical terms. Sources these are typically concerned with how to *know* when some putative rule is in fact a valid rule of law. Take for instance Hart's doctrine of "rules of recognition," mentioned above. Hart does not provide a deep discussion of what laws "really" are. Rather, he primarily gives us a doctrine of how, given that we can identify some rules as "accepted" by a social group,¹⁷ we are to determine what the rest of the rules of law are. Similarly, the 1949 meetings of the International Law Commission *start* with the project of making the evidence of CIL more readily available.¹⁸ These are epistemological programs, not metaphysical ones.

One might think that lawyers and legal theorists are committing an error like Meno's - asking how to learn about something before they know what it is. The same one might think that the appropriate thing to do is come up with a metaphysical theory of rules, figure out where law fits in it, and then use that theory to critique the various theories that amount to legal epistemologies.

¹⁷ HART, *supra* note 12, at 100.

¹⁸ *Summary Records of the 31st Meeting*, [1949] Y.B. Int'l L. Comm'n, at 228, U.N. Doc. A/CN.4/SER.A/1949

If we want to hold on to the idea that law is a human creation, this would be a mistake. Whatever else is true of law, lawyers and jurists cannot be *radically* mistaken about it - just as we might say that no human knows all the rules of say, English grammar (or even follows them perfectly), but native speakers of English could not be radically and systematically mistaken about the language's grammar. If we cannot be radically mistaken about the law, then it must have a metaphysics that ensures we are right. *Identifying* law with our beliefs about it would serve this purpose. But even laying aside the question of whether we are really incorrigible about our beliefs, and the five-hundred-pound gorilla of whether states even have states that might reasonably be called 'beliefs,' this makes a muck of the *normativity* of the law - identifying the law for a state with whatever a particular state agrees to makes it unusable, identifying it with the majority belief violates the generally non-majoritarian structure of international law, and moving beyond that brings us dangerously close to the territory of strong natural law (I will discuss natural law theory more fully in chapter two).

I think we should, in fact, draw a different moral - that there just isn't much to be said about legal metaphysics aside from legal epistemology. Any description of the nature of law - customary law included - should take as its premises what can be said about how we learn about the law, make justified assertions about it, etc.

The Orthodox Test

Perhaps it is time to take a closer look at the orthodox epistemology of CIL. Again, I will take the canonical formulation from ICJ jurisprudence, though the U.S. Restatement provides a nicely concise definition in §102(2): “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”¹⁹

The International Law Commission (ILC) issued a report in 1950 intended to clarify (b), the customary law portion of the sources doctrine in the ICJ statute. The simple admonishment to look to “international custom, as evidence of a general practice accepted as law,” leaves much to be desired in the way of precision. What does ‘accepted’ mean? What sort of custom is ‘evidence’ of a practice accepted as law? The ILC expanded on (b) with a four-part test for the “emergence of a principle or rule of customary law:”²⁰

- (a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations;
- (b) continuation or repetition of the practice over a considerable period of time;
- (c) conception that the practice is required by, or consistent with, prevailing international law; and
- (d) general acquiescence in the practice by other States.

¹⁹ RESTATEMENT, *supra* note 8, §102.

²⁰ *Working Paper*, *supra* note 5, at 26.

This formulation is still rather vague. "General" acquiescence? But it will serve as a starting point for a closer examination of the nature of CIL.

Often, the test is reduced to two important elements. (a), (b), and (d) all relate to the requirement of state *practice*. The first element that is needed for a rule to be part of CIL is that states do, in fact, generally act in accord with the rule. States who do act in the relevant area must generally act in a way that is consistent with the rule, and must have done so for a long enough time for the behavior to appear regular, and not a mere coincidental accord. And states that do not act in a way that appears to support the rule (perhaps because they are not involved in that "type of situation" - for instance, landlocked states with respect to the law of the sea), must at least not oppose states that do, or protest against their behavior. Again, all of this practice need merely be 'general' (more on that in a moment), not necessarily unanimous. If most of the most important states follow the rule, and there are few significant protests, then the practice test is met.

(c) refers to a 'psychological' element in the test. Any finite amount of practice is consistent with an indefinite number of rules, and so practice alone cannot tell us which rules are part of CIL and which are not (though it may conclusively rule some out).²¹ As a result, there is added the

²¹ Although fewer than you might expect. There are two potential sorts of problems even with trying to set 'boundaries' for the law by reference to practice.

requirement that the practice be “accepted as law,” in the terms of the statute, or that there be a “conception” that the practice is required by (or at least consistent with) the law. This psychological element will give us quite a headache, but let me start with the element of state practice.

State Practice

The first element that we are instructed to look to in order to determine if some rule is part of CIL is state practice (*usus*). Inherent in the notion of ‘custom’ seems to be an identifiable and actually occurring practice with its own rules. Think again of etiquette customs - it would be odd at best to say of some culture that their etiquette required one to do X, though no

One is that we can imagine ‘green/grue’ analogues for CIL. Say all states arrest foreign vessels fishing within three miles of their shores. This would rule out a rule such as, “states may never arrest foreign vessels more than two miles from shore.” But it would not necessarily rule out a rule like, “states were not able to arrest foreign vessels more than two miles from shore until this very moment, but starting next week they can.” Such a rule, without any further support, would be odd but not incomprehensible - and it could not be ruled out merely by the requirement that rules fit past state practice, any more than empirical observations to date can rule out the claim that emeralds are grue, not green.

The other is that, especially in the case of negative practice, the motivation is not always clear. Judge *ad hoc* Van Den Wynagert, in *Congo v. Belgium*, argued that the lack of prosecutions of foreign ministers did not represent (as the majority opinion in the case held) a rule barring such prosecutions, but rather mere political expediency and politesse (Arrest Warrant of 11 April 2000 (*Congo v. Belgium*) 2002 I.C.J. (Feb. 14) (dissenting opinion of judge Van Den Wynagert) *available at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214_vdwyngaert.PDF), at 7). See also discussion of the *Lotus* case below. Even positive practice might pose a problem of this sort, since much of it could rest on the reasons other states had for failing to punish a state’s practice.

one ever did it. So the first thing to look for, when looking for custom, is practice in accord with the rule in question.

Things are not *quite* this simple, though I am not going to deal with many of the questions that arise over practice at any length. Consider element (b) of the orthodox test, the requirement of repetition. How long is 'considerable?' Given that any change begins at some moment, does this rule out changing custom (i.e., does this generate a form of the chronological paradox, below) - after all, surely zero time is not a 'considerable' length of time, and so the first (and therefore the second, etc.) instant of a new custom could not actually be new custom?

Some theorists (notably, Bin Cheng²²) have, in fact, argued that custom can be 'instantaneous.' The idea is that, if a consensus of states decides that they would like to change the practice, that decision alone - without any prior practice - changes the rules. Consider an analogy: you and I make up a game and begin playing. After a while, we decide that it isn't as enjoyable as it could be, and decide to change one of the rules. It would seem that the rules of the game change after we make our decision, even before we start playing again - if the first move you make was legal under the old rules but is illegal

²² Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 513, 532 (R. St. J. MacDonald & D.M. Johnston eds., Martinus Nijhoff 1983).

under the new one, I can say, "wait, don't you remember, we *changed that rule.*"

It strikes me that we ought to resist this model, and insist on the importance of state practice. Since there is no international legislature, and not even any forum in which states can come together and express views about the law that are uncontroversially understood to be decisions about how to change it,²³ I think that we need to take more seriously the problems that ascertaining state 'decision' pose for such a theory. But this *does* commit me to saying what contribution, precisely, actual material practice plays in generating normativity, a task I will take up in chapter four.

The other problematic issue with respect to practice is how many states are "a number" and how much acquiescence is "general." Clearly, we do not want states to be able to unilaterally change international law - other states at least need to have, and fail to take, an opportunity to check them.

A clue to the best answer can, I think, be found in the debates over the existence of 'special' custom. In some cases, notably the 1950 *Asylum* case, the ICJ has recognized the existence of 'special' custom. In deciding that Colombia was obliged to turn over to Peru an individual to whom the

²³ Because they are not binding, UN General Assembly votes do not have this property. A state may vote to support some resolution that would seem to impose an onerous duty on it precisely *because* it knows that such a vote does not count as its decision to be bound by the resolution. See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* 385 (Finnish Lawyers' Publishing Company 1989) and OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 88 (Kluwer 1991)

Colombian ambassador had given asylum (at the embassy in Peru) because the asylee was accused of common crimes (and that, had he been accused of political crimes in Peru, Colombia could maintain its asylum), the court recognized the potential for there to be customary obligations that held “regionally or locally,” even as it held that Colombia had not provided sufficient evidence of a regional norm that supported its actions.²⁴ Generally, CIL is thought to apply to the international community as a whole. But the court’s willingness to accept the notion of a more limited custom confined to a recognizable sub-community of states implies that the ‘generality’ requirements of practice have more to do with there being a robust, identifiable and coherent practice than with absolute numbers.

In this essay, the precise boundaries of “general practice” will not be my theme (though they pose a difficulty that even a theory along the lines of my own would ultimately have to confront). Rather, I will focus on the problems of the ‘psychological’ requirement, since it poses problems that would persist even if we had a perfect handle on what the relevant practice to be assessed was. Practice *alone* cannot tell us what rules it follows, and without authoritative rule-makers, it’s not clear what will help. But this notion that practice is important because there must be a robust and

²⁴ Asylum (Colom. v. Peru) 1950 I.C.J. (November 20) *available at* <http://www.icj-cij.org/icjwww/idecisions/isummaries/icpsummary501120.htm>.

coherent community that *uses* some putative rule will be an important theme of (again) chapter four.

Opinio Juris and the Chronological Paradox

There was a time
I thought that I was really smart
My point of view meant everything
- *The Scofflaws, "What I Think"*

Merely looking at state practice is not enough to identify a rule of CIL. First of all, there is a highly abstract problem with trying to do this, alluded to above. Wittgenstein famously noted that any finite amount of practice is in accord with an indefinite number of rules.²⁵ There is no way to directly read a rule off action in the first place.

Secondly, and this is the question that tends to worry international legal theorists more, not all rules are legal rules. A state may act out of comity, a sense of morality, fear of retribution, political expedience, or any number of other reasons that are not specifically legal. States may follow various rules of international comity *more consistently* than international laws, while at the same time insisting that their behavior does *not* legally oblige them.

²⁵ See for example Kripke's discussion of 'plus' vs. 'quus' (SAUL KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE 7ff (Harvard UP 1982)). I will have more to say on the subject of Wittgenstein and rules in chapter four.

We need some way of determining what rule is instantiated by some line of practice, and also some way of distinguishing the *legal* rules that structure state practice from other sorts of rules.

To solve these problems, a second element, *opinio juris sive necessitatis* (hereinafter, *opinio*) is added to the test for CIL. *Opinio* is a 'psychological' element that attempts to track the distinctions states make in how they conceive of their practice. This is the element articulated in part (c) of the ILC's report on custom, above. Similarly, the U.S.'s restatement of international law states that

For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation... a practice that is generally followed but which states feel leally free to disregard does not contribute to customary law.²⁶

The ICJ has tinkered with its formulation in a series of cases, but the basic thrust has remained the same. In particular, important statements of the *opinio* requirement can be found in the Permanent Court of International Justice's *Lotus* case, and in the ICJ's *Asylum* and *North Sea Continental Shelf* cases.

²⁶ RESTATEMENT, *supra* note 8, §102.

On August 2, 1926, the French ship *Lotus* and the Turkish vessel *Boz-Kourt* collided. When the *Lotus* arrived at Constantinople, the Turkish government detained and tried one of its officers for negligence in the accident. In the course of rejecting France's argument that there was a customary law barring prosecutions of foreign nationals of the sort that Turkey had undertaken, the PCIJ made an early statement of the *opinio* requirement. The PCIJ ruled that France had not made its case, even though it was able to point to a lack of such prosecutions, because "the rarity of judicial decisions... merely show[ed] that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so..."²⁷ Not only does this raise a problem for the use of 'negative' practice, it articulates the importance of a state's "recognition" of a rule or sense of obligation.

On October 3, 1948, rebellion broke out in Peru. After the rebellion was crushed, the Colombian ambassador in Lima gave refuge to one of its leaders, and requested safe passage out of Peru for him, arguing that Colombia could unilaterally declare someone deserving of asylum. The Peruvian government countered that the asylee was wanted on common crimes, not for solely political offences, and so did not merit safe passage.

²⁷ S.S. *Lotus* (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 28.

The court's rejection of Colombia's argument rested on the fact that, while diplomatic asylum was in fact generally granted and respected when requested (i.e., that Latin American states generally did not challenge their neighbors' determinations that someone was deserving of asylum), no rule permitting a state to unilaterally declare someone deserving of asylum was "invoked" to justify those grants. So again, some acknowledgment of the rule was required.²⁸

In 1967, Germany, Denmark, and the Netherlands became embroiled in a dispute over the method for delimiting their territorial zones on the North Sea continental shelf. Denmark and the Netherlands favored an equidistance principal, which was contained in a treaty to which Germany was not a party. In this case, the ICJ stated the *opinio* requirement explicitly in terms of belief. In order to establish that the rule for the extension of the continental shelf that the Netherlands favored was in force as a matter of customary law, it was not enough to show that many states (even states not party to the treaty in which it was codified) followed it. Those acts also had to "... be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is

²⁸ Asylum, *supra* note 24.

implicit in the very notion of the *opinio juris sive necessitatis*.”²⁹ The ICJ explicitly connected this version of the requirement to the doctrine set out in the *Lotus* case.³⁰

All of these formulations of *opinio* are slightly different, but the general idea is the same. In order for some rule to become part of CIL, states must follow that rule out of a sense of, or belief in, legal obligation.

The *opinio* requirement purports to solve both of the indeterminacy problems outlined above. We can answer the question of what rule states are following by asking what rule it is that they *believe*³¹ they are following - and our identification of the rule will then benefit from all the determinacy of a belief. Of course, if states do not have a relevant belief about their legal obligations with respect to some practice, we will still be unable to determine what rule they are following... but the question will then be moot, as there is no chance of generating a rule of CIL from such practice anyway.

²⁹ North Sea Continental Shelf (F.R.G. v. Neth.) 1969 I.C.J., at 45; cited in HAMBRO, *supra* note 2, at 97.

³⁰ *Id.* at 99.

³¹ I am bracketing questions about whether or not states can really believe things, or even have meaningfully belieflike states or properties. The question is deep, interesting, and could easily be the subject of an essay twice the length of the present one. For the sake of argument, I will grant proponents of a psychological reading of *opinio* the claim that it is meaningful to talk about what states believe. I will generally talk about state ‘beliefs,’ but this should be understood as potentially referring to a pseudo- or quasi-belieflike state that states have, rather than ‘true’ beliefs.

Opinio should also settle the question of whether some practice is a matter of law or something else (say, comity). If states do not believe that their practice is a matter of law, then it is not generative of law. Case closed.

Note that the two requirements go hand in hand. *Opinio* could no more do without practice than practice without *opinio*. There must be some objective element to the test, else there would be no way of distinguishing what the law *is* from what states *think* the law is - this is not admirable consensualism about rules, it is the dissolution of rules entirely.

Now that we have a fuller explanation of customary law under our belts, we can state the chronological paradox more precisely. In fact, it is concisely (and candidly!) discussed in the reporters' notes to §102 of the U.S.

Restatement:

There have been philosophical debates about the very basis of the definition [of customary law]: how can practice build law? Most troublesome conceptually has been the circularity in the suggestion that law is built by practice based on a sense of legal obligation: how, it is asked, can there be a sense of legal obligation before the law from which the legal obligation derives has matured?³²

This is the essence of the chronological paradox. If some putative law is to become part of CIL, *opinio* requires that the states acting in accord with

³² RESTATEMENT, *supra* note 8, §102 rep. n.7.

it believe that it *is (already)* the law. Paradox infects both change in customary law and its original creation. If some law is to be changed, states must believe that the law is no longer in force in order to cause that law to be no longer in force. If law is to sprout in a previously barren area of international relations, it must somehow already exist there - and since, presumably, no law pre-existed human formation of it, this would mean that there could be no customary law at all.

Strictly speaking, as it stands, there is no paradox in thinking that a state's belief in the legality of some act might create that very legality. For instance, states might *mistakenly* believe that some act is already legal. D'Amato has attributed this theory to Cheng,³³ though Cheng denies it is his view.³⁴ At the very least, this should be a theory of the last resort. In the first place, it requires us to accept the *unpalatable* conclusion that international law is based on a series of persistent errors. More damagingly, it requires us to accept the *implausible* conclusion that a consensus of states *could* make such mistakes about the law.³⁵ It is not as if the *opinio* requirement is an esoteric doctrine known only to initiates of the ICJ. And if

³³ D'AMATO, *supra* note 6, at 66.

³⁴ Bin Cheng, *supra* note 22, at 531.

³⁵ It is important to note that they must be *mistakes*. On the orthodox conception, were states to conspire to *pretend* to an erroneous belief in new or changed law, this would not succeed in generating new law - since it is *beliefs* that satisfy the *opinio* requirement, and nothing else. I mention this only because it may occur to the astute reader that the latter sort of thing is precisely the sort of thing that states might do.

it is to be read straightforwardly and literally, it is not insurmountably difficult to apply - nor does it contain anything that would seem to indicate the likelihood of repeated, convergent mistakes on the part of state actors applying it in good faith.

I would also point out that allowing false belief to constitute *opinio* would seem to make a muck of the whole notion of *belief*. One way of describing the chronological paradox is in terms the notion of 'directions of fit.' Some mental states are characterized by the requirement that they be revised to fit the world, and some by the requirement that the world be revised to fit them. The canonical examples are belief and desire. If I am not willing to revise my beliefs in light of things I learn about the world³⁶, then they are not beliefs (they may be hopes, wishes, dreams, etc). Similarly, if I am not willing to act so as to revise the world in accord with my desires, they are not really desires (again, they may be hopes, daydreams, etc). I will have more to say about 'direction of fit' in chapters three and four, but for now this intuitive idea should suffice.

³⁶ All of this is generally speaking. I am aware of all the sophistications arising from considerations of the holistic nature of beliefs (see for instance W.V. Quine, *Two Dogmas of Empiricism*, 60 PHIL. REV 20 (1951)) and the interaction of various desires. I need not revise my beliefs in the face of one bit of recalcitrant evidence, and I need not act on all my desires whenever I have the opportunity. But if we keep in mind that, other things equal, we should make our beliefs fit the evidence and we should pursue our desires, I think the thrust of my point stands.

If we accept the orthodox understanding of *opinio*, and allow false belief to count, beliefs about CIL seem to be rather odd creatures. There would be, for instance, no clear distinction between having a true belief about CIL and having a false one. In any realm, there may be some false beliefs that can bring about their own truth (e.g., if I believe that I cannot succeed, I probably won't, even if I otherwise could). But here things would be too easy - a false belief would be just as epistemically good as a true belief, from the perspective of the state actor (since even 'true' *opinio* is ineffective without practice, and on this view 'false' *opinio* plus practice would make itself true). Granted, we might make out a kind of distinction between 'true' and 'false' *opinio* for the individual state actor - 'false' *opinio* is any belief that does not secure general assent. But this still makes *opinio* more like a vote than a belief. A dissenting state might be able to convince you that your *opinio* was imprudent, or evil, but not that it failed to accurately fit the world. If *opinio* is a belief, then there must be some state of the world that precedes the formation of that belief and which it is about. If *opinio* does not fit the world in this way, but requires or causes the legal world to fit it, then it might be an interesting propositionally-structured 'mental' state, but it would not be a belief (or reasonable belief-analogue) on any common understanding of the term. Hence the purely traditional reading of *opinio* undercuts itself again - whatever states are doing, they can't be

believing that the law pre-exists itself. In short, the very notion of belief requires that we be able to make sense of *correct* belief, and so we cannot countenance a field in which all the operative beliefs are false.

So, to be precise, it is because genuine beliefs must be able to be *true* beliefs - and, furthermore, that it is implausible and repugnant to base law on mistakes - that we get from the requirement of a belief in pre-existing law to the chronological paradox. If we gloss *opinio* as requiring that states *accurately* believe that their behavior is already required by law if it is to generate new law, then we have the paradoxical requirement that the law pre-exist itself.

To re-state the paradox epistemologically, the *opinio* element of the test requires us to ask, "Do states believe that this is the law?" But if states have justified beliefs about what the law is, they have arrived at them via the practice-plus-*opinio* test, and so must have asked themselves the same question. So any application of the test presupposes a previous successful application to the same rule. But if the previous test was successful then, it seems, the rule could not be *new*. Hence, again, there is no coherent way to think of CIL changing or emerging.

Revising the Orthodox Test

Where does this leave us? The most straightforward reading of CIL's epistemology is rendered incoherent by the chronological paradox. Ultimately, we want to understand the nature of CIL so that we can intelligently apply it and modify it. Since, as I have suggested, the metaphysics of law is intimately tied to its epistemology, we need to have a coherent epistemology of CIL. The two projects are not unrelated - since the accepted epistemology cannot be *radically* mistaken without us losing any grip on CIL, we must reflect on the epistemology of CIL to determine its character. But our thought about its character will be guided by our goal of creating a usable epistemology of CIL, one shorn of incoherency. To borrow a phrase from Rawls, we need to start with the accepted (but incoherent) epistemology of CIL, and then head in the direction of 'reflective equilibrium' between pragmatically useful epistemology and coherent theory.

I suspect that a version of the chronological paradox is likely to infect any such 'bootstrapping' normative realm as CIL, and so resolving this sort of paradox is crucial not only for our understanding of international law, but for making sense of any realm in which humans are supposed to create normativity. So this will be my primary goal in the dissertation - constructing

a theory of CIL-formation that makes sense in light of the orthodox epistemology, but is not subject to the incoherency of the chronological paradox.

Coming to any sort of equilibrium will require the remainder of this essay. In the next chapter, I will set aside one approach to understanding CIL and examine two others that will serve to shape the inquiry.

II: Some Theories of Law Try Their Hand at the Paradox

I am hardly the first person to notice the problems with the orthodox test for CIL. Many writers, such as the crafters of the U.S. Restatement, seem unperturbed by them. Some others have attempted to revise the test so as to come up with a coherent theory of CIL. In this section, I would like to examine representative attempts from two different camps, legal realism/critical legal studies and natural law theory.

Why Not Positivism?

The astute reader will notice a striking absence above - legal positivism. In what follows, I intend to largely ignore positivism - or, anyway, the most straightforward forms of positivism. I would like to take this moment to say a bit about *why*, and then leave the issue to rest at least until chapter four, when I will take up the question of applying my theoretical results to discussions about CIL.

As with most -isms, positivism can be surprisingly hard to nail down in a simple definition.

Positivism is generally associated with a belief to the effect that *all* there is to the law is 'black-letter' law, the rules explicitly found on the books and in precedents (if applicable). This is not quite an accurate

characterization of positivism, however. Many positivists accept Hart's point that the 'black-letter' law must be supplemented by one or more meta-laws, the 'rules of recognition,'¹ or some similar principle that lets us identify validly enacted law. Rules of recognition are societal rules about what sorts of writings and utterances count as law-creating. These rules are not themselves enacted law, but they are needed to tell us the difference between 'black letter' law and other black letters.

What positivists *really* commit themselves to is one or another version of what is often called the "separation thesis."² The basic idea is that the content of the law need not³ depend on any extralegal considerations of value, especially on moral values.

Two issues need to be cleared up here. First, this "depend on" talk is vague and metaphorical - it will be concretized differently from the perspective of different legal actors. So, for example, the separation thesis from the judge's perspective more concretely reads as something like, "a judge, in applying the law to a case (i.e., determining the law's content with

¹ HART, *supra* ch. 1 note 12, at 94.

² By Marmor, among others. See ANDREI MARMOR, POSITIVE LAW AND OBJECTIVE VALUES 71 (2001).

³ One can be a 'softer' or 'harder' positivist (sometimes referred to also as 'inclusive' or 'exclusive' positivism). 'Soft' positivists merely claim that there could be a system of law that did not get any of its content from extralegal norms. But, soft positivists concede, we *could* enact laws that made essential reference to, say, moral norms - "no one shall inflict cruel punishments," e.g.. 'Hard' positivists claim that legal norms *never* depend on extralegal values for their content (even when they may seem to). I present this information merely for your edification, dear reader, and I do not plan to make much of the distinction between hard and soft positivism. For more on the distinction, see *id.* ch. 3, p.49ff.

respect to some specific subject), need not be guided by any extralegal values.” From the legislator’s perspective, it means that an evil law is, if passed, law (i.e., the content of the system of law as a whole can be determined by looking solely at social facts, and need not be vetted by reference to morality) - and on the ‘strong’ positivist reading, the legislator *cannot* enact morality into law (the closest she could come would be to, e.g., incorporate a reference to the general societal *beliefs about* morality). And so forth. In general, say the positivists, any legal actor’s use or understanding of the law should not be determined by the extralegal values to which she subscribes.

Second, the separation thesis as I have stated it, fails to distinguish positivism from natural law theory (a drawback, to say the least). Some natural lawyers may agree with the above formulation, on the grounds that moral values are *not* extra-legal (this may be true of Dworkin’s version of natural law⁴, as well as Finnis’, below). Even if moral values have a life outside the law, we should be careful to avoid the natural lawyer’s claim that - where law exists - they form an integral part of it. So we need to append to

⁴ For example, Dworkin (in RONALD DWORKIN, *LAW’S EMPIRE* (Belknap 1986) argues that the judge should choose the interpretation of the law that makes it the best from the standpoint of political morality (at 256), but explicitly rejects the view that by doing so, his ideal judge is doing something other than applying the law as he understands it (at 262). The implication is that moral reasons are an acceptable sort of legal reason.

our above definition the rider, "and legal rules and values are determined (entirely) by matters of empirical social fact."

So why am I leaving positivism aside? The quick answer is that the solution to the chronological paradox that I will give is, in many ways, positivist - in spirit.

The reason I feel a need to add to the literature is that straightforward positivism does not go far enough to solve the paradox. The positivists' general commitment is to respect the enacted law. But the *problem* with CIL *is* the enacted law, as laid down in the ICJ statute and elsewhere. I hold with the positivist approach insofar as I propose that we should only *reject* the orthodox formulation of the CIL test if we absolutely must, given that it is the closest thing to positive law we have on the issue. But since the test appears to set an impossible standard, the bare positivist dictum that we should look to the texts does not help. Positivism, in its purest form, is a theory about the nature of law that understands the law to be what we make it; to foreshadow, I agree but think we need a better account of how those things we make - rules and laws - work.

Of course, positivisms are generally bolstered by some theory of what we *should* look to when the texts are unclear or contradictory - intent of the writers, original understanding, etc. - or a theory of why we should not look

to anything in particular in hopes that it will resolve the issue (the view that judges are free 'interstitial legislators'). Since granting international adjudicators (which, remember, include not just or even primarily ICJ judges, but also state actors) discretion to 'legislate' in the cases where the orthodox test gives unclear guidance (i.e., all cases) would more or less allow anyone to say that CIL was whatever they wanted it to be, some back-up theory of what the law is in 'hard cases' is needed. I will not respond individually to all the myriad positivist theories here; instead, I hope that my positive argument for the virtues of my own theory about *how* we should understand the rules of CIL working when those workings are unclear will stand on its own. However, I will have some things to say about the drawbacks of positivist theories on the paradox as they become appropriate, and I will discuss some differences between my theory and Hart's (which may seem like a close cousin) towards the end of chapter four.

For the remainder of this chapter, I will bracket positivism and discuss why various proposals which reject the authority of the orthodox test are unsatisfactory. First, I will discuss some approaches from the direction of legal realism and critical legal studies, which deny authority and normativity to the rules generated by use of the orthodox test *at all*. Then I will take up

natural law theories, which subordinate the authority of socially-created CIL to a higher normative power.

Legal Realism and Critical Legal Studies

Even if we leave positivism aside, other attempts have been made to solve the chronological paradox, from within other major jurisprudential traditions. In this section, I will discuss the realist and critical traditions, and how partisans of these approaches (e.g., Michael Byers and Martti Koskenniemi) have attempted to deal with the paradox. In the next, I will examine the paradox from the standpoint of natural law theory. Of course, before applying each theory to the paradox, I will need to elaborate on the theory's basic structure.

The classic statement of Legal Realism is found in Oliver Wendell Holmes, Jr.'s "The Path of the Law." There, Holmes declares that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."⁵

Philosophically minded readers should note that legal realism, as a doctrine, is almost precisely the opposite of what one might think it is. Legal

⁵ OLIVER WENDELL HOLMES, JR. *The Path of the Law*, in THE ESSENTIAL HOLMES 160, 163 (Richard Posner ed., University of Chicago 1997).

realists (hereinafter, simply realists), unlike metaphysical realists about some realm, *reject* the notion that there is a “heaven” of legal entities existing somewhere in abstract space to be discovered.⁶ Instead, all there is is the practice of law by various legal actors: most prominently judges, but also police, legislators, citizens, etc. And, they argue, this practice is not best explained by (exclusive) reference to the body of rules we generally identify with “the law.” Holmes, for instance, thinks that many of the concepts we think of as important to the law dissolve when washed with the “cynical acid” of viewing them from the perspective of the “bad man,”⁷ i.e., the person who only asks of the law, “what can I get away with?” For instance, Holmes takes aim at the duty of keeping contracts. Fretting about the true nature of legal duty in this case before looking at the actual system of application and enforcement, says Holmes, is useless speculation. “The duty to keep a contract... means a prediction that you must pay damages if you do not keep it - and nothing else.”⁸ The realists take a tack with law very analogous to the one that proponents of naturalized epistemology⁹ take towards knowledge - the normative questions are insoluble because ill-conceived, and we should

⁶ Or, as Cohen refers to it, “legal magic and word-jugglery.” FELIX S. COHEN, *Transcendental Nonsense and the Functional Approach*, in *THE LEGAL CONSCIENCE, SELECTED PAPERS* 33, 46 (Lucy Kramer Cohen ed., Yale UP 1960)

⁷ HOLMES, *supra* note 5, at 161.

⁸ HOLMES, *supra* note 5, at 163.

⁹ Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 *ETHICS* 278, 283 (2001)

get down to the business of answering the empirical questions about the phenomenon (which are the ones we should really care about).

Realism is generally seen - probably rightly - as a threat to international law (not just CIL). The international legal system is notoriously weak both in respect of enforcement and adjudication. Take the example of the 'enemy combatants' detained by the U.S. at Guantanamo Bay after the war in Afghanistan. Many of us would like to say that treating them in ways that violate the Geneva Conventions, or the Convention Against Torture (say) would be illegal under international law. But now wash this claim in Holmes' 'cynical acid.' The ICJ has jurisdiction only over disputes between states that voluntarily submit to its arbitration. The US is unlikely to agree to see this case decided before the ICJ - and anyway, individuals (such as the prisoners) cannot bring suits there, the old Afghan government is gone, and the new Afghan government is friendly to the US. The ICC has jurisdiction only over individuals from nations that have ratified its statute, and the US has not. The UN cannot bring any force to bear without the Security Council, and the US has veto power there. What about self help? No nation can militarily challenge the US at this time, and our economy is so strong that serious economic retaliation is also unlikely. So what is left of the claim that torturing the Guantanamo prisoners would be illegal under international

law?¹⁰ Merely the prediction that, if the US does so, many other nations will issue statements scolding us. Hardly the expression of a robust legal regime.

Critical legal studies (CLS) is something of a successor theory to realism. CLS shares with realism the claim that legal practice is the central phenomenon to be investigated, and that it is not successfully explained by reference to what are generally thought of as legal rules and concepts alone. But there are two significant differences between classic realism and CLS.

First, CLS theorists tend to be even more rule-skeptical than realists. Realists generally accept the view of legal rules drawn from positivism, in that they accept that there are many easy cases in which the legal rules *do* successfully explain the practice, and focus on those difficult cases where legal reasons are indeterminate (or at least not clearly determinate) and which therefore reach the appellate level.¹¹ If the speed limit is 65, and the police catch me doing 85, the easiest way to predict what will happen to me is by looking to the rule in force. Granted, we could say all sorts of things about why people become police, how numbers are treated in society, the social construction of the science that led to radar guns, etc. But in easy cases, all of this is irrelevant - the most important thing (at least if I am

¹⁰ The question of whether the executive's actions are legal under *U.S.* law is different - from Holmes' perspective, because it involves a whole different set of actors, relationships, and possible sanctions.

¹¹ Leiter, *supra* note 9, at 298.

trying to avoid fines, and not to critique society) is the law. In harder cases, though, realists think that looking deeply into the eyes of the law will not help, and we can only proceed by looking at all of those other factors - political power, moral theory, what the judge ate for breakfast, etc.

CLS theorists tend to take a stronger view. Koskenniemi, as we will see in a moment, does not merely claim that there are many cases in which CIL does not give us a clear answer, or where the rules of CIL fail to fully explain what international legal actors do. Instead, he concludes that what we normally think of as the laws of CIL do not and cannot determine the actions of international legal actors *at all*, because the system they comprise is simply self-inconsistent. But they do not think this means there is no system of norms governing their behavior. CLS theorists in general combine realist skepticism about the influence of rules with a vaguely deconstructionist approach to legal texts and (typically) leftist politics to critique the practice of law. They (again, typically, and this is at least true of Koskenniemi) do not see their project as a way of clearing away legal metaphysics in favor of a positive empirical project. Rather, they see their theory as a negative *normative* project, a way of 'unmasking' the invocation of legal norms to legitimize behavior that is in fact motivated by a (usually, it is argued, pernicious) normative structure.

The reason that I treat realism and CLS together here is that they agree that an understanding of legal practice is to be found, not in rationalist speculation about the nature of law, but rather in an examination of actual legal practice (whether in its empirical aspect, like the realists, or its covert normative aspect, like CLS theorists). They agree, that is, that *law* as we normally think about it, is not an important or interesting normative influence on legal practice. And even though CLS theorists tend to be less concerned with the positive empirical project, they share a common 'predictive' bent with the realists, in that both claim to be uncovering what *really* makes the law come out the way it does.

There is, of course, much disagreement even amongst theorists who generally belong to the realist and CLS camps. I would like to discuss two representative theorists, each of whom have explicitly taken up the question of CIL and the chronological paradox.

Michael Byers and Realism about Customary International Law

Though Michael Byers explicitly raises the issue of the chronological paradox in his Custom, Power, and the Power of Rules¹² he does not explicitly solve it. Nonetheless, he seems to indicate that he believes his positive

¹² MICHAEL BYERS, CUSTOM POWER AND THE POWER OF RULES 130-133 (Cambridge UP 1999)

theory of the *opinio* element in CIL formation escapes the paradox, at least in the sense that it provides us with a coherent guide to making predictions regarding when state action will in fact be constrained by general state practice. In this section, I will attempt to reconstruct Byers' position as best I can - but I will need to fiddle with his explicit text a bit in order to draw out what I think is his best argument.

First, it should be noted that Byers is not a textbook realist (and in fact, does not self-identify as a realist). In particular, his project is to praise rules, not bury them. Much of Byers' book is taken up with detailed descriptions of the sorts of cases in which state practice *does* seem to be meaningfully impacted by the existence of a rule of CIL - that is, when the best explanation of why states act or refrain from acting is that they take some customary law to be binding on their action. But he is concerned with those rules in a very realist manner. What Byers is looking for is an empirical theory we can deploy to explain why the presence of certain kinds of general practice - the kind lawyers take to be custom-generating - does in fact constrain state action.

Byers' re-formulation of *opinio* is, I take it, intended to be the core of his solution to problems such as the chronological paradox. Traditionally, *opinio* is a belief of *specific* acts that they are or are not subsumed under *specific* rules. Since change in customary law requires that some specific act

which is not subsumed under the existing rule (or under which there is no existing rule to subsume) be done from a sense of obligation to follow that rule, we have the paradox.

Byers relocates the operation of *opinio* to the level of the entire process of customary law-formation and removes it from the level of individual rules and acts.¹³ *Opinio*, Byers claims, is not a specifiable element of belief involved with an individual rule. Rather, it is a diffuse set of “shared understandings” (explicitly invoking Wittgenstein) among state actors that allow them to differentiate legally relevant and legally irrelevant acts. These understandings perform the first function of *opinio*, which is to separate state practice that is a matter of law from that which is a matter of, e.g., comity or even mere coincidence.

There are, of course, at least three ways of being legally relevant. An act may simply be legal, it may be inconsistent with existing law and not creative of new law (that is, illegal), or it may be inconsistent with existing law and creative of new law (creative).

The problem remains of differentiating, within those legally relevant acts that are inconsistent with existing law, those which are creative and which are simply illegal. On this point, Byers seems to subscribe to the theory that all acts that are creative of new law are, at the moment they are

¹³ *Id.* at 150.

performed, strictly speaking illegal. In the final analysis, what separates creative illegal acts from 'mere' illegal acts is more or less the willingness (or lack thereof) of other states to take the offending state to task. "The question becomes more one of opposability than of breach."¹⁴ If other states also regard the violated rule as restrictive and in need of change, they will begin to act in a way that is in accord with some new rule, consistent with the illegal act. Since they share an understanding about which acts are legally relevant, this new practice will inaugurate the new rule. If a preponderance of other states finds the old rule to be in their interest, they will punish the pioneering state for its breach - and, since its act has legal relevance, reinforce the existing rule.

Byers' Realist slant allows him to be much less perturbed by this than a different theorist might be (such as, for example, me - I will be returning to the subject of illegality). The question of whether or not an act is 'really' illegal or 'really' law-creative is relatively moot from the standpoint of a realist, empirical/predictive theory of international law. The empirical aspect of the question at hand is: will the international community retaliate against the state that is breaking the old rule, or follow suit and in the future retaliate against states that are breaking the new rule? From a realist

¹⁴ *Id.* at 158.

perspective, labeling an act 'legal' or 'illegal' is just shorthand for this sort of prediction anyway. Byers just cuts to the chase.

What *would* be a problem, even for a realist, would be if our best predictive theory of state action required states to engage in an epistemologically impossible calculation - like the orthodox CIL test - before deciding how to act. If we impute an incoherent decision process to states as part of our theory, it will not be likely to issue in reliable predictions. And generating accurate predictions is the core of the realist approach to law - remember Holmes' 'definition.' So a realist approach must either discard the test entirely (at least as a predictive element - it might turn out that judges think about the test, but such thoughts have no effect on their actions), or reconceive it in such a way that we can understand how it is applied. A realist might, of course, claim that judges' deliberations are mere window-dressing or epiphenomena. This would be a theory that *discarded* deliberation, however, rather than one that made an incoherent deliberation process part of our theory of legal decision-making.

Byers is concerned to keep the test. Because the only 'psychological' element in his theory is the diffuse set of shared understandings, and because he can discard 'legal' and 'illegal' as genuine properties of acts, no chronological paradox arises. States make decisions about when to punish breaches of customary conduct, and when to go along, in terms of their

shared understandings of legal relevance, which do not need to include beliefs about the prior legality (even in the realist sense) of *particular* acts.¹⁵ All that we need to impute to the 'psychology' of states, on Byers' theory, is a general way of carving out legally-relevant regularities and acts from legally-irrelevant ones.

So how do they do this? When invoking the Wittgensteinian idea of 'shared understandings' it is very easy to lapse into true but uninformative claims. Byers wants to make *opinio* a matter of shared understandings regarding legal relevance. Which acts are legally relevant? Why, the ones that we collectively identify as legally relevant, of course. Unless CIL is a sham, states and various international organs do in fact somehow identify legally relevant acts. But the question was - *how* do we tell which acts are legally relevant and which are not? *Opinio* was supposed to answer that question, and Byer's conception of *opinio* succeeds... after a fashion. Byers opens up a non-circular place for distinguishing specifically legal motivations for retaliation and acquiescence by making the prior sense of obligation

¹⁵ Note that if they *did* need to have even realist/predictive beliefs about particular state acts, this would avoid the chronological paradox as previously stated (there is no problem with having the 'property' of will-be-retaliated-against in advance of the decision to retaliate), but it would merely exchange it for another sort of paradox that realism is often accused of falling prey to. If states deciding whether or not to retaliate for a breach of general practice had to think, "should we consider this act illegal - and by that, I mean, will we retaliate?" they would be left in the incoherent position of trying to figure out what they were going to decide. Byers' diffuse conception of *opinio* avoids this particular problem.

required a general and diffuse one that need not already be bound to the *particular* emerging rule - it is just a matter of shared understanding of the overall legal project. Unfortunately, it looks as if those 'shared understandings' may be not-fully-articulable. Which leaves us with a theory that makes it comprehensible *that* states gravitate towards rule-bound behavior, but does not illuminate *how* they do so.

It would be over-hasty to condemn this approach. The fact that state actors and other legally-relevant international agents may not be able to articulate their selection criteria is not a fatal flaw with this sort of view - agents need not be able to explain their practices to perform them; try to explain what, precisely, it is that you like about your favorite band and how, precisely, they differ from everyone else who has copied their sound (or how they've improved on the originators of their genre).

Nor need the theorist necessarily be able to give substantive criteria. "Legal relevance" may simply be a brute, unanalyzable property (at least, I see no immediate reason why this would be impossible in principle). Nonetheless, such a quietist position in the law (at least) seems like it should be reserved for the last resort.

Fortunately, Byers does not leave things there. As an international relations theorist, Byers attempts to analyze the nature of the understanding about legal relevance that states share in terms of *interests*. The system of

international law, according to Byers, “determines the common interests of most, if not all, States, and then protects and promotes these common interests with rules.”¹⁶ The ‘shared understandings’ that states have are not direct, brute beliefs about when acts are legal or illegal, legally relevant or irrelevant. Instead, they are shared understandings of what is in a state’s interest, and what counts as acting for or against those interests.

The focus on interests (as objective needs of the states involved) helps Byers break out of the problem of whether some bit of state behavior counts as “action” or not. There is no easy way to do this – sometimes, for instance, “mere speech” will count as “practice” and sometimes it will not.

“Practice,” for Byers, more or less amounts to anything that expends a significant amount of a state’s power.¹⁷ Since states are presumed to be rational agents, they will only expend power to further their interests, and so looking at the total set of power-expenditures on the part of states gives a far more accurate picture of their interests than anything they could say.

Presumably, one function of the international law system (and its organs, like courts, the UN, etc) is to give states a broader range of opportunities for relevant expenditures of power, in the form of taking public positions for and against various rules of CIL.

¹⁶ BYERS, *supra* note 12, at 163.

¹⁷ *Id.* at 156.

It is less clear how this theory helps us understand how states come to distinguish legally relevant from legally irrelevant actions. Byers should not want to fall into the trap that natural law theorists like Finnis do¹⁸ by making *everything* states have a good reason to do a matter of law. In fact, Byers' focus on objective state interests may make his theory sound very much like a different (and more simplistic!) version of natural law theory.

It is crucial to keep in mind that, because of his realist bent, Byers does not see his theory as *normative* at all.¹⁹ For instance, in his extended discussions of jurisdiction, reciprocity, personality, and legitimate expectation, he is almost entirely concerned with the ways in which these core rules of international law "qualify" the exercise of state power.²⁰ The emphasis is on how state practice is, in fact, affected by the existence of the international legal system. If states were more willing to exercise power within the boundaries they are granted under international law, then this would be the sort of "qualification" that Byers is looking to uncover.

¹⁸ See the discussion of natural law, below.

¹⁹ BYERS, *supra* note 12, at 15-16.

²⁰ An exemplary passage: "The ability of the principle of jurisdiction to qualify applications of power may be observed in the fact that the *efficacy* of a State's participation in [the process of law-formation] frequently depends on the geographic relationship between the area or activity governed... by the particular customary rule in question and the jurisdictions of the various states which are interested in supporting or opposing that rule." *Id.* at 55, emphasis mine

I suspect that Byers would give a very legal-realist answer to the question of how we can tell which interests generate law and which are just interests. Byers would likely be happy - to the extent that his theory has normative implications for law at all - to simply say that interests generate law when states attempt to oppose rules based on those interests to other states in international legal fora. Is the conflict resolved by the ICJ? Then it is legal. By the UN Security Council? Well, maybe... If no specifically legal actors get involved, and no legal principles are invoked, the conflict isn't a matter of law. This deflationary picture of the difference between law and everything else is also consistent with Byers' lack of concern about illegal change in international law. He does not seem to be concerned that any change in CIL is, on his theory, illegal - so long as it is the sort of violation that no one (important) tries to hold against the violator.

Even if Byers is presenting a basically descriptive/predictive theory, as the classical realists took themselves to be doing, its predictive power will be undermined if it provides no theory of when states will resort to legal fora. Here is where Byers' *political* realist assumptions²¹ may come in handy. Byers works from the assumption that states are basically rational self-interested agents. If we accept the assumption of state rationality, then states will go to legal rules when and only when the use of legal rules is in their interests.

²¹ BYERS, *supra* note 12, at 14.

Provided with a theory of what state interests are, or at least a shared understanding of it, we have the skeleton of a highly effective empirical theory of how and when the presence of international legal institutions and practices will impact state behavior.

There may be many times that law does impact behavior. Legal procedures are often conservative of the *status quo*, and hence in the interest of powerful states to support. It may often be an alternative to a costly military conflict. And, if Byers is right that the structure of CIL filters and identifies state interests, the rules that come out of the process of state legal interaction may more accurately reflect state interests than even the state's agents' own beliefs about those interests.

Were Byers attempting to provide a theory of the law's normativity, he would have difficulties with the approach he has taken. We would need, for instance, an answer to the question why states *ought* not oppose some sorts of illegal behavior. The traditional conception of *opinio* is at least an attempt to answer this question, by requiring that the normativity be (in some, as yet obscure, sense) 'already there' in the legally creative behavior. Byers, in contrast, is concerned with how states *use* rules (especially in the sense of shared beliefs in rules) to promote their interests, not how rules do in fact

normatively protect their interests. There is much to be said for this approach, in terms of what it sets out to do.

But building a normative theory on top of it is not trivial. If we were to try to straightforwardly 'normativize' the theory, it would lose much of its interest. Byers leans heavily on the political realist assumption that states can identify their interests and will act in accordance with them. What if we just replace "will" with "ought to?" If we take "state interest" to be something like, "what the state desires, or thinks is good for it" our theory will be a form of (at best rational) egoism, which is fairly close to no normative theory at all. If, instead, "state interest" is taken to mean "what is in fact good for the state" then we have transformed Byers into a variety of natural law theorist.²²

To recap: The chronological paradox is generated by the traditional requirement that states believe in the positive legality of some particular act. Byers therefore replaces the traditional requirement with a diffuse *opinio* in the form of 'shared understandings' amongst states about which acts are legally relevant (and, I think should be added, in what ways they are relevant). This eliminates the paradox by not requiring odd beliefs about any one act, while still allowing us to differentiate legally relevant behavior from

²² On which, see the following discussion of natural law theory.

other sorts of behavior - my gloss is that one of the 'shared understandings' must be about when it is in states' interests to use international legal fora. But, since Byers' theory is nonchalant about the specific illegality of legally creative acts (and must be, since to do otherwise would resurrect the paradox), his solution come at the intolerable cost (at least from my perspective) of ignoring the normativity of the law.

I think that Byers' sort of analysis, of when state practice is in fact modified by rules, is suggestive and potentially very fruitful to a normative theorist (it is, at least, the sort of study that normative theorists ignore at their peril). But finding a way to bring the normative aspects of the law into a basically legal realist discussion is a difficult task.

Koskenniemi's Critical Approach

A remarkable fact about custom is that it is constantly in danger of collapsing either into tacit agreement or a naturalistic principle. The function of a separate doctrine about custom is to make room for a law between these two; a law understood in an ascending fashion (as agreement) and a law understood in a descending way (as non-consensual principle).²³

Alice couldn't help laughing, as she said "I don't want you to hire *me* - and I don't care for jam." "It's very good jam," said the Queen. "Well, I don't want any *to-day*, at any rate." "You couldn't have it if you *did* want it," the Queen said. "The rule is, jam to-morrow and jam yesterday - but never jam *to-day*."²⁴

²³ KOSKENNIEMI, *supra* ch.1 note 23, at 350.

²⁴ LEWIS CARROLL, *THE ANNOTATED ALICE* 247 (Martin Gardner ed., Bramhall 1960)

Martti Koskenniemi *does* try to look at international practice in a normative light, and he is not amused by what he sees. Like many CLS theorists, Koskenniemi sets out to demonstrate that there is an incoherency in the normative structure of the system accepted as law, an incoherency that allows legal actors to carry out their own (potentially pernicious) moral and political projects behind the screen of 'law.'

In particular, Koskenniemi thinks that international law (not just CIL) is simultaneously drawn to two incompatible poles, "apology" and "utopia." An apologetic law would simply be a description of what states do - it could not be used to critique it. Koskenniemi is engaged in a normative project, so he is not satisfied with this, as a classic realist, or Byers, might be. In particular, Koskenniemi's background concern seems to be whether the power that international legal actors exercise is *legitimate* - for instance (this is not Koskenniemi's example), does Israel have a right to send its troops into the West Bank to combat terrorism? States certainly *use* talk of legal rights and duties to influence other states, but is this just a sham? Realism does not directly answer this normative question.

On the other hand, Koskenniemi argues that international law should not fall into "utopianism" - essentially, moralism. Customary law, especially, is supposed to be *customary*, to arise from human practices and not from an abstract normative realm. It bears mentioning that Koskenniemi has very

particular reasons for rejecting natural law theories that I do not entirely share. He imputes a sort of at least structural moral relativism to “liberal” politics,²⁵ and so thinks that standard political theory cannot countenance natural law. In taking his critique to be important, I would simply emphasize that we are trying to hold on to the idea that law is a human creation, and making customary law a set of norms that are knowable completely independent of facts about state practice would violate that.

The traditional conception of custom - and in particular, *opinio* - is neither too utopian nor too apologetic, but at the price of generating the chronological paradox. Since, on the orthodox conception, it is generated by state practice and belief, it is not merely natural law. But since that belief is supposed to be true to the law as it actually is, it is not merely a matter of describing how states behave. Unfortunately, as we have seen, these two claims are not obviously compatible.

Various ways of rehabilitating the notion of custom have been proposed, but all push it either into apology or utopianism. Koskenniemi does

²⁵ “[The liberal theory of politics] assumes that legal standards emerge from the legal subjects themselves. There is no natural normative order. Such order is artificial and is justifiable only if it can be linked to the concrete wills and interests of individuals.” KOSKENNIEMI, *supra* note 24, at 6. As it turns out (and will become apparent in chapter four), I am more or less in agreement with Koskenniemi’s “liberal theory” until the last sentence.

a whirlwind analysis of the bulk of them (which I will only summarize here), and finds them wanting.

Since it seems to be *opinio* that causes the most problems, perhaps we can do away with it? Kelsen has proposed this (in an early work),²⁶ but this would lead to a particularly degenerate form of apologism - a kind of custom that is not normative *at all* - the law would be whatever we happen to do. To avoid these problems without re-instating a psychological requirement, we can try to amend our model to make only practice that is *just* (or otherwise meets some sort of non-psychological evaluative criterion) law-creative.²⁷ But this obviously commits us to a naturalistic notion of justice (or what have you). Back to utopia.

Maybe we can make use of a psychologistic component, some form of *opinio*, but come up with a less problematic notion. The traditional model generates a chronological paradox because *opinio* is supposed to play both a "declaratory" (*opinio* is about what the law already is) and a "constitutive" (*opinio* is law-creative) role. Can we pick just one? It seems not.²⁸ If we think of *opinio* as playing a purely declaratory role, then we still need *another*

²⁶ Cited in KOSKENNIEMI, *supra* ch. 1 note 23, at 364. Kelsen later repudiated this pure-practice theory; see HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 440 (Robert W. Tucker ed., 2d ed. Holt, Rinehart, and Winston 1966).

²⁷ KOSKENNIEMI, *supra* ch. 1 note 23, at 364-365.

²⁸ *Id.* at 369-370.

theory of what *makes* the CIL that is so declared. This theory must either have a psychological component, or lack one. If it has a psychological/*opinio* component, then we've only succeeded in pushing the problem back a step. And if it does not, then we have all the problems of a pure-practice model of custom, already dismissed above. On the other hand, if *opinio* is purely constitutive, then our theory is now too apologetic - CIL has become whatever states think it is.²⁹

General considerations on the role of *opinio* aside, particular attempts to re-conceive *opinio* fare little better. If we conceive of *opinio* as a practical attitude of reliance³⁰ (making it analogous to estoppel), we must

²⁹ One might object by pointing to the consensus/persistent objector structure of orthodox customary law. Koskenniemi does recognize the doctrine of persistent objection, though he is dismissive of it. In essence, he thinks that to accept the doctrine of persistent objection would strip customary law of all opposability. If any state can object to the application of any customary law at any time, then no law will be able to be applied. Even restricting objection to the emergence of a norm does not seem to help - a state against whom a norm is opposed may claim that it did not recognize the norm as arising, and hence did not see any emergence to object to earlier... but it certainly objects if *other* states are going to insist that a norm has arisen, and will register its objection now. To critics who say that this objection is not "persistent," they will reply that they have only just now become aware of the rule (since they believed the law supported a different rule), and hence their protests *have* persisted for the entire (very short) period they were aware the law was emerging. On the other hand, to read 'whatever states think it is' as referring to a consensus of states in the aggregate that takes no account of the individual state's consent would violate sovereign equality. For the moment, I would like to explore Koskenniemi's argument on his assumption that customary law cannot admit objectors if it is to be normative (*id.* at 393-394). I would also add that even claims a state has already made in accord with a putative norm of customary law may not bar its later objection, so long as it could argue that it pushed those earlier claims not as general legal obligations but as moral claims, local customs, etc.

³⁰ *Id.* at 365-366.

ask: *any* reliance or only *legitimate* reliance? The former is a form of apologism, the latter of utopianism.

Maybe *opinio* is not some particular nation's belief, but a 'spirit of the age' or (if we must stay with individuals) the 'essence' of the nation.³¹ This could conceivably be normative, and would transcend whatever any state actor happened to desire or think. It is not entirely clear what such an 'essence' could be. If it is something purely metaphysical, and we should take talk of a 'spirit of the age' literally, then this seems to be a particularly esoteric version of natural law theory (and this is more or less how Koskenniemi treats it). If it is something more like a normative structure implicit in the practice of states or the politics of the age, it may be the correct theory - but understanding *how* a normative structure could be implicit in practice in this way is precisely the problem we are trying to *solve*.

Maybe *opinio* is the *only* true element of CIL, and practice is just evidence of it.³² No paradox here - *opinio* can be self-aware, and need not pre-exist itself to do so. But, like any pure-constitutive view, this theory is either blatantly apologetic - as if any state disagreed (for instance, the violator state), the law would not be binding - or requires some form of

³¹ *Id.* at 367.

³² *Id.* at 368-369.

majority rule that would straightforwardly violate the sovereign equality of states.

Far more common is an approach that treats practice as a sort of *necessary* evidence of *opinio*, much as we might not accept another individual's statements about her beliefs unless they are borne out by her actions. This might even seem to meliorate the apologetic implications of basing CIL purely on *opinio* as (tacit) consent by 'raising the bar' on what it means for a state to grant or withhold consent. That is, the purely arbitrary ring of 'consent' or 'protest' might go away if we require that states do some legwork to protest.

Now we face another dilemma.³³ Is the evidence of *opinio* provided by practice defeasible or not? If it is not, then we have smuggled in some principle that lets us know what nations 'really' value better than they know themselves. This sounds like a new version of utopianism. On the other hand, if practice really is just an epistemic crutch, and its evidence about state will and belief is always defeasible, then we have not raised the bar at all, and fallen back into apologism.

³³ *Id.* at 370.

Have the theorists who advanced all these theories just been insufficiently clever? Or is there something deep about the notion of CIL and *opinio* that dooms our models to oscillate between apology and utopianism?

Koskenniemi seems to think that the problem's roots lie deep in a principle he accuses of being a "fundamental assumption" of "liberal politics," the distinction between will and belief.³⁴ *Opinio*, to do its job, must be both declaratory and constitutive, but it cannot be. Declaratory (belieflike) and constitutive (will- or desirelike) psychological states are mutually exclusive - thanks to the liberal assumption.

Beliefs, Koskenniemi thinks, cannot determine the will on their own, so any psychological state that is responsible to the world cannot on its own compel us to act - that is, give us a compelling reason to act. Since to say that some norm is in fact binding on a state just is to say that that state has reason to act in accord with the norm, giving *opinio* any declaratory function will rule out its possessing any constitutive role.

On the other hand, on the 'liberal assumption,' the will is essentially *not* bound by the way things are. So if *opinio* is will-like and reason-*generating*, it cannot also be belief-like and reason-*tracking*.

³⁴ *Id.* at 375.

It should not be surprising that, on Koskenniemi's 'liberal assumption,' custom is doomed to incoherence. The normativity of CIL must come from *somewhere*, after all. It can't arise spontaneously out of mere behavior, so we need something that lets us interpret, conceptualize, or evaluate that behavior. If nothing psychological/conceptual can be both norm-bound and norm-generative, then we have an obvious problem. If *opinio* is responsible to norms, those norms can't come from *opinio* and so must be imported from outside the law - that is, from some form of moral law. If, on the other hand, *opinio* generates reasons for action, there can be no reasons binding the formation of *opinio*. Hence the only reasons CIL will provide are the ones states provide themselves. And a law that tells you to do what you would do if there was no law *is* no law.

Koskenniemi's conclusion is that international law (and CIL in particular) is not a system of norms so much as it is a set of techniques that allow international legal actors to argue for their preferred conclusions.³⁵ Since there is no stable position between apologism and utopianism, it is *always* possible to argue that any proposed rule of law or application of a rule is too apologetic or too utopian - it's bound to be one or the other. Ultimately, it is the will of the adjudicator and the power she wields that

³⁵ "... modern legal argument lacks a determinate, coherent concept of custom. Anything can be argued so as to be included within it as well as so as to be excluded from it." *Id.* at 361-362.

makes the difference - not the putative rule of law. Law *does* play a role in international legal practice - namely, the role of masking and legitimizing the will of those who invoke it.

There is something important here, I think, in what appears to be a CLS notion that what we think of as 'normativity' flows from power and influence, rather than the other way around. Realists take the incompleteness (again, arguing for radical incoherency in the law, rather than simple incompleteness, seems to be largely a CLS tactic) of law to indicate that the best we can hope for is an empirical study of what factors are actually good causal explanations of 'hard' decisions. Koskenniemi, along with other CLS theorists, seems to want to make stronger claims about the relationship between normativity and practice - even if the 'real' norms governing legal actors come from outside the law, 'legitimizing' is a normative function, if it has any true sense at all. But I do not think legal discourse's legitimating function should be considered all bad - and I think there will turn out to be much to be said for Koskenniemi's conception of CIL as a set of techniques, 'moves,' rather than as a set of rules. I will return to these ideas later on, when I discuss the pragmatics of speech acts in chapter four.

I find Koskenniemi's negative project deeply unsatisfying, though. I am unsatisfied in part because Koskenniemi seems to be, in large part, creating

his own problems. It is not clear to me that anyone has held the assumptions he imputes to "liberal politics," at least not in so rigid and absolutist a form. And it also seems that Koskenniemi may be too quick to find contradiction where there is only tension and puzzlement. Not that puzzlement cannot be enough of a problem, especially when we allow states to arm themselves to the teeth and remain puzzled. To fully understand the alternative to Koskenniemi's cynicism, much more will need to be said, especially about the way the relationship between belief and language should be understood in international law. Without re-hashing the entire history of debate over basically Humean philosophies of action like the one Koskenniemi thinks underlies "liberal politics," let me note that, to find a place for custom between "apology" and "utopia," we *will* need to deprive Koskenniemi of his "liberal assumption." We need to recognize that actions in the legal realm are *not* undertaken with arbitrary freedom, but always within a highly structured context that already constrains possibilities not just of action but also of will and evaluation themselves, by placing normative constraints on the ways we talk about action. The notion of norms implicit in a practice that I will develop in the rest of this essay is such an account - the practice is both what constrains action, and the space in which actions are conceived.

Natural Law Theory

Who makes the law?

Someone else!

- *Oingo Boingo, "No Spill Blood"*

In any event, Byers and Koskenniemi agree that an understanding of how legal practice operates cannot be found in the norms of law. And they agree that we should not look for a complete and coherent theory of how individual laws exert their normative force over legal practice - they don't. But perhaps they are wrong? Perhaps we can understand how the normative force of individual laws binds practice by looking beyond the law to the extra-legal values that dominate *it*? This is the project of natural law theories. Granting that what we normally think of as the law (primarily 'black letter' law, the sort of things that positivists would allow in) cannot determine how legal agents should act, they are not shy about looking to extralegal sources of normativity to fill in the gaps.

On the most simplistic kind of natural law theory, the chronological paradox is not a serious problem. The rules of law are already written in to the fabric of reality in all their specificity, and judges, state actors, and the like merely discover them. There may be a metaphysical *mystery* about their

change, but the specific kind of paradox that arises with the *opinio* test will likely not be an issue.

For a simple natural law theorist, the orthodox test does not, strictly speaking, describe a *source* of law - the source of law is human nature, perfect reason, G-d's command, or some such extra-legal power. At best, the orthodox test is a procedure by which mortal judges, with their imperfect apprehension of the true legal realm, can reliably figure out what the law is - given that most state actors are reasonable and have some legal acumen, any rule that gains widespread acceptance is likely to accurately reflect the heavenly law. Since the orthodox test is not itself a source of the law, it cannot generate any existential paradoxes, and we are left with only the usual problems of determining the dictates of deity and reason.

This view is, of course, highly implausible, and it is not clear that any actual theorist holds it. One major difficulty with such a simplistic version of natural law theory is that many of our laws seem to be very unlikely candidates for derivation from right reason (or whatever). It may seem plausible to think that somewhere 'out there' is the rule that we ought not kill other human beings unless sanctioned by war, self-defense, or authorized punishment. But do we really want to say that the command to drive on the right in the US and on the left in the UK is a deep metaphysical truth about the universe? Probably not. Furthermore, such a simplistic theory runs

counter to the very strong intuition that law is at least in part a human creation.

There are more sophisticated theories of natural law that avoid such obvious problems, but they also need to do more work to resolve the chronological paradox. In this section, I will examine two attempts to deal with the paradox using more plausible natural law (or at least natural law-ish) theories.

It is reasonable to think that, if there is a natural law, it contains a command like, “pick one side of the road to drive on and stick with it,” rather than “drive on the left in the UK.” This is the central insight of the tradition of a tradition of natural law theories that traces itself back to Aquinas.

For instance, on John Finnis’ view, the natural law is a set of highest-order principles from which positive laws derive their obligatory force. However, while the normative force of positive law is parasitic on that of natural law, the positive laws themselves cannot simply be (uniquely) derived from natural law.³⁶ Natural law, for Finnis, does not contain a host of specific rules about what to do in every conceivable legally-relevant situation. Instead, it contains a theory of the basic forms of human good,

³⁶ JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 23-24 (Oxford UP 1982).

methodological principles governing practical reasoning, and a set of general moral principles.³⁷

This is not enough - even enriched with as much empirical knowledge about the world as one could ask for - to deduce a unique positive law. A legislator who knows that car crashes interfere with the human good of life still has to pick one side of the road or the other. And, according to Finnis, no general natural principle can be legally binding until it has been given a determinate interpretation by a mortal legislator.³⁸

Finnis' favored metaphor, following Aquinas, is that of an architect building a house.³⁹ Any choice the architect makes is ultimately justified by the (non-architectural) good of building a house, and is constrained by the laws of physics, mathematics, etc. Nonetheless, the architect has genuine choice in how she builds the house. Furthermore, she must do more than just directly refer back to her commission when making each choice. That is, she must go beyond asking herself questions like, "is this the best, or at least one of several equally good, ways of building a house?" A lemon-yellow awning over the front porch may be a fine choice for a house in general - but not if you are in the middle of building a painstaking replica of a Bavarian palace.

³⁷ *Id.* at 23.

³⁸ Finnis makes one condition on the full (morally binding) legal validity of some norm that it originate "in a way which is legally valid (in the specially restricted, purely legal sense of 'legal validity')..." *Id.* at 27.

³⁹ *Id.* at 28.

The choices she makes in designing the house must not only be legitimate choices from the perspective of her ultimate goal, they must harmonize with each other.

To de-metaphorize: on Finnis' account of natural law, legislators are free to choose among various ways of realizing the general good. They have genuine freedom of choice (within limits), and the system of laws that they choose to construct is animated not only by the ultimate goal of the general good but also by its own internal logic, and leaves some space for purely arbitrary choice. So, despite the fact that Finnis rests the ultimate normative force of law on extra-legal grounds, law in his view enjoys a high degree of autonomy from those grounds. Enough, at least, to give some sense to the idea that law is a human *creation*, and not something we simply discover.

Finnis sees a very specific role for law - especially customary law - in the pursuit of the general good. All communities, the international community of states being no exception, are beset by *coordination problems*. Which side of the road one drives on is a simple but elegant example of such a problem. It is in everyone's interests that we pick a side of the road and stick to it, but no one much cares which one, and in the absence of a legal authority it would be quite difficult to get everyone to agree, and chaos would ensue. We could easily multiply problems of this kind - coordination

problems arise whenever there is a general interest in having *some* consistent rule that is followed by all, but there is no rule that on its own is much better than any other⁴⁰; the lack of a salient rule will make it difficult to secure the needed general agreement on the *particular* rule, unless someone is empowered to make an arbitrary decision. Finnis thinks that we create legal systems in large part to solve such coordination problems.⁴¹ We have customary law because a standing rule to follow the lead of whoever first arbitrarily chooses one solution is a good way to solve them.

It is important to understand what sort of reason to conform to customary rules states have, on Finnis' view. The natural law tells us of various human goods that are thwarted if we cannot solve coordination problems.⁴² Thus, states have reason to solve coordination problems - they have a moral obligation to promote the general good. Since failing to conform to an emerging customary norm would interfere with the solution of a coordination problem, all states have (*ceterus paribus*, at least) reason to conform to emerging customary norms. This is how the normative binding force of customary norms arises on a natural law account.

⁴⁰ A 'pure' coordination problem is one in which the various parties really have no preference amongst the alternatives, except to prefer to choose the alternative that everyone else is choosing. There are also 'mixed' coordination problems, which arise when parties have their own preferences amongst alternatives, but still prefer coordination to choosing their preferred alternative at the expense of a lack of coordination.

⁴¹ FINNIS, *supra* note 36, at 244.

⁴² Presumably, it does the first part by giving us a conception of the good and the second by giving us canons of practical reason.

Finnis' solution has the disadvantage of resting on a very strong moral realism, and as a result is less persuasive when the problem at hand does not look like one of working out how to pursue some intrinsic value. Gerald Postema is a bit more cautious about the *sort* of normative force the solution to a coordination problem has. Game theory, from which the notion of coordination problems is drawn, typically deals in *preferences*, rather than objective values (or even interests). It is relatively uncontroversial that most people, e.g., *prefer* not to be horribly mangled in car accidents. It is a bit more controversial to claim, as Finnis does, that our aversion to crashes is more forceful than this, that we are somehow *obliged* to avoid car accidents, that it would be not only *stupid* but *wrong* for us to, say, drive on either side of the road, willy-nilly.

If some rule solves a coordination problem for a group of agents, then it is *rational* for them to obey it, in the purely means-end sense of rationality. But can we argue that it is obligatory without presuming that the end they are seeking is obligatory? This would be an advantage. Take, for instance, the laws of the sea, many of which are customary (or at least were customary in origin). Given that most states have an interest in maritime trade, they are rationally bound to seek coordination on such things as the management of

sea lanes, the extension of territorial waters, etc. But are states *obliged* to promote maritime trade? Doubtful.⁴³

If we want to have a robustly normative customary law (one that does not bind only when it is in the interest of its subjects), then we probably need to look for a way to generate obligation a bit more indirectly than Finnis does.

Postema focuses on the *cooperative* nature of social projects animated by custom. Following a custom is not just a matter of blind imitation (or, I would add, coincidence), nor even just of doing what others expect - it is “engaging in a common form of behavior, thereby meeting the expectations of others which, one recognizes... are mutually dependent.”⁴⁴

When engaging in behavior that is a solution to an ongoing coordination problem, even if the coordination does not serve any morally obligatory end in itself, “fair play” becomes a factor. Regardless of how our custom came to be, if we follow its conventions because we believe that it is to our benefit, then we are committing ourselves to play fairly. Were I to violate some

⁴³ Perhaps efficient maritime trade is a reasonable instantiation of some higher-order value, but it does not look like a solution to a coordination problem involving that value. There seems to be no need, e.g., to agree on whether every nation in the world will pursue globalized capitalism or isolationist communism. Finnis needs to base the authority of *customary* laws both on the natural goodness of certain values and on the solution of coordination problems because, in the absence of some authoritative lawmaker, it only becomes imperative for an agent to follow the general custom of instantiating whatever higher values are at stake if agreement on how to instantiate them is somehow a virtue. If the pursuit of efficient maritime trade is a legally authoritative project for states, it cannot be so in virtue of mere custom. Even on Finnis’ view, we would need some intervening non-customary authority to render following customary law of the sea obligatory rather than merely rational.

⁴⁴ Postema, *supra* ch. 1 note 1, at 179.

customary rule for my own advantage, while still seeking to reap the benefits of *your* adherence to the customary rules, this would be unfair (I would be a classic free-rider).⁴⁵ So, at least when customs arise that are to the mutual benefit of all participants, considerations of fairness may make adherence obligatory, not merely rational - so long as we accept 'fairness' as one of our natural goods (which seems plausible enough).

To return to the problems of the orthodox test: the problem with customary law is that no one is in a position to be the arbiter and so legislate directly. What we need is a system that will allow the (largely arbitrary) choices of states to act in particular ways to give other states reason to conform. Ultimately, the hope is that the initial more-or-less arbitrary choice of some rule by a state or group of states will 'attract' other states to it, and the coordination problem will be solved.

Finnis analyzes the process as follows:⁴⁶ First, states recognize that the general good obligates them to find a rule to coordinate their activity in some realm. The belief that some particular rule will serve that purpose well then takes hold - this is what counts as *opinio*, for Finnis. If that widespread belief

⁴⁵ *Id.* at 182.

⁴⁶ FINNIS, *supra* note 36, at 242.

is accompanied by a widespread practice in accord with the rule, we can judge that the rule has become authoritative.

On first glance, this account might seem to run afoul of the fact that *opinio* is supposed to be about what authoritative norms there *are*, not about what authoritative norms it would be nice for there to be. Finnis himself seems concerned that his natural law theory should not make law simply collapse into morality. So is Finnis just equivocating, or perhaps changing the subject?

On his own terms, Finnis is not equivocating. Laws are, for him, authoritative because of their role in promoting the general good. A rule that would solve a coordination problem *if* it were accepted as authoritative is not yet a law. But the reason we have to adopt it is the *same* sort of reason we have to follow laws. Laws are obligatory because they promote the general good, which is the same sort of obligation we have to act in accord with some rule that - if authoritative - would solve a coordination problem. Finnis can keep a distinction between actual law and aspirational law without equivocating on *obligation* because he claims that there *is* no legal obligation entirely distinct from moral obligation. When a law is adopted, the difference is in the specificity of our obligation, not in the kind of obligation we have.

It might be helpful to think of the difference between our moral obligation to find a way to promote the general good and our legal obligation to obey authoritative rules as one of *degree*, but not of *kind*. Finnis does not claim that *opinio* is about *authoritative* rules - just about obligation. And obligation, for him, is not divided into legal and non-legal species. So Finnis gets to have it both ways - *opinio* is about states' obligations (in a univocal sense), but rules are not authoritative until there is already *opinio*.

I still have two worries about natural law theories such as Finnis' and Postema's, however.

The first problem is that both Finnis' and Postema's views only give customary law authority in cases of coordination problems. And, in fact, many of the situations typically dealt with by customary laws look like coordination problems - questions of how far territorial waters should extend is probably not a 'pure' coordination problem (each state would, *ceteris paribus*, probably prefer to control as much of the seas as possible), but the overriding need is for some general rule that will let ships navigate reliably. Postema is, in fact, not concerned with customary international law, but with the conventions that must underlie legal systems (Hart's 'rules of

recognition').⁴⁷ His narrow focus lends his theory increased plausibility - again, who holds the legislative authority is not a matter of indifference to legal subjects, but it is generally thought better to have *an* authority (even one that you don't like) than anarchy (even if it means that you can listen to the person you like best).

Finnis' broad focus, more in line with the specific problems at hand in this essay, causes him trouble. One of the most interesting (and potentially important) realms of CIL is customary human rights law. But human rights laws seem highly implausible as solutions to coordination problems. Was the international community at some point concerned to decide whether everyone or no one should be allowed to commit genocide? Or whether everyone or no one should use torture? It is hard to see what the relevant coordination problem could have been in these cases. And if we *could* read these as solutions to coordination problems, then it would sound very much like a matter of doing the right thing for the wrong reasons.⁴⁸ Intuitively, we

⁴⁷ Postema, *supra* ch. 1 note 1, at 167ff.

⁴⁸ The idea that international laws are (all and only) justified as solutions to coordination problems is closely related to the idea that retribution is a way of enforcing societal cooperation by imposing compensatory penalties on those who attempt to 'free ride.' That is, we punish theft because the thief benefits from a regime of property rights without taking on the costs of that regime (by not taking what he wants, when he wants to). But, as Jean Hampton (among others) points out, this theory works rather less well for crimes against persons - it's not clear that I impose any costs on myself by not killing you (typically, at least - and many people don't *ever* find themselves in a situation where not killing is a burden). Similarly, it's not at all clear that the problem with genocide is that it's not *fair* to the non-genocidal regimes. See the discussion in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND

want to say that genocide is bad in itself, that something about the very nature of the act makes it a violation, not merely that outlawing genocide is the best way to harmonize international behavior.

Maybe human rights laws are not really part of CIL. Koskenniemi suggests that many rules get labeled 'customary' in the rhetoric of international law simply because international lawyers do not know where to put them - they are not treaty rules, and no one wants to argue directly for natural laws, so they must be custom.⁴⁹ And, in fact, many of these rules seem to be relatively good candidates for unmixed natural law - we may not even need an authoritative legislator to make them binding (in some sense), since there is only *one* way to avoid genocide - don't commit it.⁵⁰

Without making this an essay on moral realism, it is difficult to argue against such a view. If we insist that some authoritative body must pronounce the illegality of some act for it to be illegal, then we can still argue that many things we talk about as if they were customary human rights norms are in fact not legal rules - but for the natural law theorist they are still binding on states (just morally so), so this is a quibble at best.

MERCY 116ff (Cambridge UP 1988) (on justifying law and punishment by fairness of cost-distribution).

⁴⁹ "'Custom' has become a generic name for nearly all non-conventional standards..." KOSKENNIEMI, *supra* ch. 1 note 23 at 346.

⁵⁰ Rules that may arise about, e.g., *who* should take action to punish violations of such rules are much better candidates for being customary. I may not care whether a UN tribunal or national courts punish *genocidaires*, so long as *someone* does it, and there's enough cooperation to ensure that violators don't benefit from organizational infighting.

My primary objection to natural law theories like Finnis' and Postema's is really methodological, rather than substantive. I do not want to accuse Finnis of changing the subject or of collapsing law into morality. But his solution *does* depend on his helping himself to an already constituted normative realm - one whose claims fully fund the normative claims of the law and to which all our questions about *how* rules become binding can be handed off. In the case of rules that do not appear to be solutions to coordination problems, we humans have no choice in what the law will be. And if our only discretion is with respect to coordination problems, then law is a human creation only in the very thinnest of senses.

My project is to try to figure out if and how customary practices - international law in particular - can generate *new* normative material. Finnis' and Postema's answer is, essentially, that they can't. Though one cannot *derive* the law from morality, laws are only a specification of the more general principles of the moral law, or instrumental means of achieving those goods.

I recognize that there is a narrow path to walk here. It would be foolish to deny that we institute law so as to achieve some good, and this is not what I am attempting to do by reserving natural law for the last resort.

Law is not a game that we play merely for its own sake, and it is not a reflexive activity that we engage in despite ourselves. So there is a sense in which our obligation to follow laws *is* underwritten by some reason that we have to have legal practices in the first place.

Finnis is, however, saying something stronger than that. While only 'simplistic' natural law theory takes the existence of a moral rule to be a necessary and sufficient condition of the existence of a legal rule, Finnis' theory retains the claim that morality is a *necessary* condition of legality. As a result, on Finnis' theory, we cannot think about the normative structure of law independently of morality. Importantly, for instance, we can ask of any law, "is it the best?" but not "is it good?" A law that fails to serve some natural good is no law. Law is, for Finnis, not a (potentially) freestanding normative practice that we engage in because it serves some good. Instead, it is simply the part of our pursuit of the common good that centers around generating public rules so as to resolve coordination problems.

Compare Finnis' account of law with the rules of, say, fencing. Like any sport, one major reason why people fence is because they find it enjoyable (we're talking about recreational fencers, not a Renaissance swordsman who is fighting to survive). So, presumably, if fencing was no fun at all, no one would have a reason to engage in it. At the same time, it is not a condition on each individual rule of the sport that it enhance (or even not

diminish) the fun of participants in order to be genuinely binding. You and I could argue about whether or not the right-of-way rule in foil makes the sport more fun or positively thwarts the fun, without disagreeing about whether or not we genuinely have reason to follow the rule.

Finnis' account allows for choice regarding authoritative rules, but only so long as those rules serve the common good. This would be equivalent to saying that if the right-of-way rule were to make fencing less fun, no one would have reason to follow it. But that isn't how we treat sports, and it isn't - I would contend - how we should treat law. It is part of our conception of law that there can be bad laws that fail to serve the common good, and yet nonetheless exert some normative claim on people. Finnis solves the chronological paradox, but only at the cost of denying that we can even *make sense* of legal normativity apart from the natural law.

Constraints on the Next Theory

Let me sum up this introductory discussion. Customary international law is fascinating not just because of its political implications, but because the theoretical problem of reconciling the normativity of law with its human origin is especially sharp with respect to customary law.

The orthodox test for customary law, intended to reflect this dual nature, is incoherent (at least as it is generally understood). Because it

requires that states believe that a law exists in order to create law, and it is (theoretically and politically) intolerable to allow that law is generally created by mere false belief, this seems to entail that CIL must pre-exist itself (the chronological paradox).

What we need is a theory of how the norms of law work in practices that will allow us to generate a coherent epistemology for CIL. Realist theories of how laws are applied drain law of all normativity, while natural law theories strip too much human initiative out of the law. Our normative theory of how laws are applied should not make their application a matter of non-rational reflex (or extra-legal ideology) or submission to external values.

This is a tall order.

III: Pragmatism about *Opinio*

In the last chapter, we surveyed a number of approaches to the chronological paradox. All of them proceeded by attempting to modify our understanding of *opinio* in some way and - unfortunately - all of them are ultimately unsatisfactory. In this chapter, I will begin to say something about why that is.

In particular, I think the relatively easy understanding of *opinio* as about state 'belief' needs to be looked at more closely. As I will explain in this chapter, what most traditional theories of *opinio* really need is not a full-blooded notion of belief, but just a belieflike 'direction of fit' - but this is also the aspect of the concept of belief that gives rise to the chronological paradox. So long as we are stuck with it, the paradox will continue to resist a satisfying solution.

This chapter will begin moving us in a non-psychologistic direction. I will examine Anthony D'Amato's more linguistic understanding of *opinio*, and assess what I believe are the shortcomings it retains because of its descriptive approach to CIL discourse. Ultimately, the failings of descriptivism - whether psychologistic or linguistic - will push us in the direction of an alternate, pragmatic and linguistic analysis of *opinio*.

Psychologism about *Opinio*

D'Amato traces the modern understanding of *opinio* to François Génys's work on domestic customary law in France.¹ As D'Amato notes, a primary purpose of having an *opinio* requirement is to let us distinguish legally relevant from legally irrelevant conduct. A second purpose, as I noted above, is to let us distinguish within legally relevant conduct between the *merely* illegal and the norm-creative.

Perhaps in part because of the deep difficulties that the two-part orthodox test creates, many writers on customary law have tried to construct a model that would allow us to drop one in favor of the other.² But this is to mistake the fundamental distinguishing nature of *opinio*. Practice is mute - that is, it has no determinate conceptual structure that would let us read binding *rules* (as opposed to mere regularities) off of it - without *opinio* to articulate it, but *opinio* without practice is empty words - it makes no distinction between the law and mere aspiration. The chronological paradox is generated by an attempt to come up with something that could play this articulating and distinguishing role.

¹ In his *Méthode d'interprétation et sources en droit privé positif* (1899), cited in D'AMATO, *supra* ch. 1 note 6, at 48.

² *Id.* at 49.

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A common feature of the approaches surveyed in the last chapter is that they take their cue from the 'psychological' understanding of *opinio* embodied in the orthodox test - *opinio* is a "belief" about the law, or a "sense" of what is legally required. The problem is not so much that they impute beliefs to corporate entities like nations. I have not taken issue with the idea that states might have beliefs (or 'beliefs'), in part because I am not sure that any of the theories I have surveyed really turn on it. Most of them could, I think, happily adopt a metaphysically thin or even metaphorical understanding of state belief.³

The major element that these theories *do* take away from the notion of belief is a belieflike 'direction of fit,' which has been briefly alluded to above. The notion of direction of fit comes from the philosophy of mind and normative theory, and is often invoked in discussions of whether or not beliefs can be inherently motivational.⁴ Here, it is a useful tool for understanding the way in which *opinio* is supposed to help us distinguish between law-as-it-is and law-as-it-should-be. Unfortunately, understanding *opinio* as having a

³ Given the somewhat practical role that Wittgensteinian shared understandings play in Byers' theory, he may have the most difficulty admitting that they are not really there. He might, however, claim that properly speaking these are psychological states of state *agents*, rather than the states themselves. In any event, I am willing to give his theory the benefit of the doubt on this point.

⁴ See, for example the discussions in MICHAEL SMITH, *THE MORAL PROBLEM* 116-124 (Blackwell 1995) and JONATHAN DANCY, *PRACTICAL REALITY* 78 (Oxford UP 2000).

belieflike direction of fit generates the chronological paradox. Let me explain.

A belief is the sort of thing that is intended to conform to the way the world is; by contrast, desires are mental states whose point is to motivate us to change the world to fit them (they have world-fits-mind direction of fit). If I *believe* that Monica Belucci is in love with me, there is something wrong with my belief, and (*ceteris paribus*, of course) I ought to change it. If, on the other hand, I *desire* that Monica Belucci *be* in love with me, then I have reason to change something about the world (and best of luck to me with that). However we think about the metaphysical status of *opinio*, all the foregoing accounts take it to have a belieflike, *opinio*-fits-world direction of fit. Because *opinio* is supposed to help distinguish legally relevant from legally irrelevant, and legally creative from merely illegal behavior, it is supposed to reflect these categories *as they are*. There are, of course, many ways of doing this - *opinio* might reflect the underlying moral structure of the law, it might be the solution to pre-existing problems of coordination, or it might be a general understanding of the power relations in which the law operates. But at bottom it must be about what the law *is* - *opinio* should follow the law and not the law *opinio*. Everything else is a question for the metaphysicians.

But direction of fit is precisely the bit that causes the chronological paradox. Having fits-world direction of fit means that there should not be anything in *opinio* that is not in the world already, making *opinio* into something like a 'mirror' of the world. And the legal significance of any act is determined by *opinio*. Yet somehow, this process is supposed to yield change in CIL.

Ultimately, I think we need to eschew any assimilation of *opinio* to belief or a belieflike phenomenon. The easiest way to see what ought to replace this model is to examine Anthony D'Amato's "articulation" theory of *opinio*, which takes an explicitly non-psychological approach to the issue. It will not get us everything we need, in part because it is still too beholden to the problematic aspects of the psychological model; but it will point us in the right direction.

Articulation

Did you ever think
Persistence
Could prevail against the almost unbearable weight
Of the system?

- Bad Religion, *Believe It*

Anthony D'Amato proposes a deceptively simple model of *opinio*:
articulation.

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What makes an act *legally* relevant, on the articulation model, is that it instantiates (or violates) a rule that has been proposed as a legal norm. “The articulation of a rule of international law...” says D’Amato, “whether it be a new rule or a departure from and modification of an existing rule - in advance of or concurrently with a positive act (or omission) of a state gives a state notice that its action or decision will have legal implications.”⁵ The important distinction here is that the articulation model drops the conception of *opinio* as psychological. It substitutes a strict distinction between speech and practice, with *opinio* being a matter of what has been entered into the public record, as it were, in virtue of being articulated by an authorized state representative.

D’Amato has some grounds in the case law for such a conception of *opinio*. For instance he seems to be right that we should read the PCIJ’s reference in the *Lotus* case to a ‘consciousness’ of a duty to abstain from prosecuting foreign nationals for crimes that occurred only partially in the prosecuting state’s territory as at least partly metaphorical.⁶ More telling than the difficulties surrounding state belief is the fact that the PCIJ declined even to *attempt* to overcome them. No general survey of state opinions was

⁵ D’AMATO, *supra* ch. 1 note 6, at 75.

⁶ *Id.* at 82-84.

undertaken, and there was no serious attempt to infer implicit state attitudes.

Instead, the court relied almost entirely on the fact that no significant actor had ever *said* that there was such a rule. Particular emphasis was laid on the fact that, whatever their 'beliefs,' France had not *protested* the existence of national legislation allowing similar prosecutions.⁷

D'Amato illustrates the role of articulation by discussing the difference between the way international law treats tourism versus the way it treats space exploration.⁸ In the first case, we have practice but no articulated legal norm. In the second, we had articulation, but as of 1971 when D'Amato's book was published, no serious practice. In neither case - as of 1971, at least - was there customary law. But the cases are importantly different. There is a lot of tourism, but no matter how long it continues in its current form, it will generate no customary law to allow tourists entry. No one has articulated a *legal* principle to that effect. On the other hand, now that we are beginning to explore other planets, there is much more likelihood of legal consequences attaching. Why? Long before exploration had begun, there were a number of UN General Assembly resolutions articulating legal

⁷ *Id.* at 84 and S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 23.

⁸ D'AMATO, *supra* ch. 1 note 6, at 77-78.

principles for the exploration of space. In space exploration, law has had a place prepared for it.⁹

Let us look at how the articulation model deals with the creation of CIL and the chronological paradox. D'Amato claims that an articulated rule moves from the "realm of speculation" into a "life as a rule of customary law" when a state undertakes an act consistent with it.¹⁰ Of course, D'Amato must mean something a bit more than this, because he does not seem to think that non-violative but (intuitively speaking) *irrelevant* acts count. For instance, if the U.S. Secretary of State says, "no state shall send armed forces across a neighbor's border unless invited to do so," and then heads out for lunch with the Secretary of Defense, we would not want to say, "new law has been created; the U.S. sent its Secretary of Defense out to lunch instead of attacking Canada." He should probably be read as saying something more like: when a state acts in accord with the rule *while undertaking the kind of action that the rule purports to regulate*, CIL may be generated. This may still cause problems with rules that prescribe non-acts (such as rules of non-intervention or non-prosecution) but, as we shall see, this is not the worst problem with non-acts, and so I will not linger on the details now. He then

⁹ By G.A. Res. 1963, U.N. GAOR, 18th Sess. (1963), for example.

¹⁰ D'AMATO, *supra* ch. 1 note 6, at 88.

moves on to the dicier question of how *much* practice is needed to properly nourish that normative life - and how resistant to change such a living law becomes.

D'Amato begins the conversation with promising pragmatism, pointing out that states most often resort to legal discourse in "claim-conflict situations."¹¹ Thus, there is no general answer to the question, "how much practice is enough?" When a dispute arises, the particular answer is usually, "more than the other guy has."

D'Amato is quickly led into an implausibly quantitative view, however. He asks us to imagine a series of cases relevant to a putative rule that nations are liable if one of their artificial satellites falls on a foreign national upon re-entry (since the details are unimportant, I will simply refer to this as rule *r*).¹² The rule is articulated, and subsequently one case arises (A v. B) in which the defendant state, A, accepts liability for the damage caused by its falling satellite, under rule *r*. D'Amato asks - what can we say about the next case, C v. D?

D can argue for C's liability based on A v. B's compliance with *r*. But C could rebut that it need not accept liability because its refusal to accept *r* will 'reset' the usage back to a level playing field (one case on each side is no

¹¹ *Id.* at 91.

¹² *Id.* at 92ff.

more settled than no cases on either side) – since change in CIL requires that we give deviations legal effect, from a future perspective (E v. F) there will be no clear usage and C’s refusal to pay will appear no less valid than A’s acceptance of liability.¹³ Hence a refusal by C to pay would become its own justification, from the perspective of any later observer.

This would not be the case if there were *two* cases consistent with *r* before C v. D, as C would then still be on the losing side of the usage even if it refused to comply with *r*. Nonetheless, because of the informal nature of enforcement in the international realm, C might defy *r* and get away with it. If C did so, then anyone following (E, say) would have the same argument that C would have had had there been only one precedent case. The bottom line is that whether or not a putative rule is law depends on whether it has more instances of compliance than a competing rule, and there is no deep distinction between illegal and norm-creative action – norm-creative action is just illegal action that enough people get away with.

This model strikes me as implausible for three reasons. It *does* capture the plausible intuitions that at least one act is needed to make a usage and that, if there is no clear pattern of acquiescence, usage has not been established. But D’Amato’s case-counting approach seems too crude. A

¹³ *Id.* at 93.

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situation in which there are a thousand instances of compliance and 999 of non-compliance does not show a significantly clearer pattern of usage than an evenly split history. Secondly, since acts may include abstentions, there may be great difficulty in counting cases to begin with - how many times didn't the U.S. invade Canada this week? Disputes are easier to individuate than acts, but we can't count only disputes, since states exhibit a grasp of the law as much in harmonious compliance as they do in the resolution of disputes. Surely we would not want to say that a law that enjoys full compliance is thereby not a law! Lastly, I see no reason to think that the first relevant act might not be a *breach* that elicits international condemnation rather than compliance - a possibility that D'Amato at least does not explicitly contemplate, and which would seem not to fit his theory.

Illegality and Counter-Articulation

I fought the law, and I won...
I am the law, so I won
- *The Dead Kennedys, "I Fought the Law"*

What concerns me most is that D'Amato's model is too crude to explain our actual understandings of how CIL comes to be and passes away. Consider the fate of the norm prohibiting torture. In *Filartiga v. Pena-Irala*, the Second Circuit Court of Appeals held that a prohibition on torture was part of

the “law of nations” (and hence actionable under the Alien Tort Claims Act) in part because of the broad consensus among scholars and official state declarations that torture was prohibited by custom.¹⁴ I know of no state that has officially declared torture norms to be non-binding on them - even abuser states tend to try to explain away torture, rather than straightforwardly claim that it is not a crime.¹⁵ So it would seem natural to regard statements against torture (such as the Convention Against Torture) as “articulations,” in D’Amato’s sense, of a customary norm.¹⁶

Unfortunately, it is also common knowledge that torture runs rampant and goes largely unpunished. By D’Amato’s analysis, the customary status of the prohibition against torture should long since have eroded.¹⁷ In fact, the

¹⁴ *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2nd Cir. 1980) The customary determination was important in this case because the ATCA only give courts jurisdiction over crimes under the “law of nations” - generally taken to mean customary law, in the current context - and not under treaty law.

¹⁵ An example that hits close to home is the recent (at the time of this writing in 2005) discussions over torture in the U.S.. The infamous ‘torture memo’ produced by the U.S. department of justice in 2002 (Memo from the Dept. of Justice to Alberto R. Gonzales, Counsel to the President (August 1, 2002) (available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf>) never directly condones torture, but it *does* go out of its way to define “torture” in such a narrow way as to exclude many acts (e.g., severe but not permanently damaging physical abuse) most people would intuitively consider torture.

¹⁶ It is generally accepted that treaties with broad acquiescence can generate customary law for non-signatories (e.g., see generally D’AMATO, *supra* ch. 1 note 6, chap. 5). It is also possible for states to be bound simultaneously by a treaty rule and a customary norm with the same content - this is important, e.g., for questions regarding which treaty rules can have reservations taken to them or be derogated from (for a discussion, see generally THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* (Clarendon 1989), chapter 1)

¹⁷ I recognize that there is some question of whether or not there every *was* a customary law prohibiting torture. My point is that anyone who thinks there is/was such a norm should - if D’Amato is right - see it as having faded away.

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fact that an anti-torture norm has been articulated is part of what makes it *vulnerable* to erosion; there may even be a norm of customary law *permitting* it now, given the number of states that torture in the face of clear declarations that torture is a legally-relevant practice.

Defenders of the customary norm prohibiting torture are, of course, aware of this. One compensatory tactic is to count statements condemning torture (even if ineffective) and national laws outlawing it (even if unenforced) as state practice.¹⁸ We should rule this sort of move out as a form of 'double counting' that defeats the entire purposes of keeping usage and *opinio* as separate elements of the test. If we count *condemnations* as 'acts,' then we lose the distinction between law as it is and law as it should be - since to condemn torture is just to say (at most) that it *ought* to be prohibited, and (unless we were to accept something like a total unanimity requirement, or majority rule) we need some way of making a distinction between what states think the law should be and what the law is. Any state or group of states should be able to be intelligibly wrong about the law. Even

¹⁸ For instance, the Restatement counts among the kinds of "practice" that can generate customary human rights law, "universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles... the adoption of human rights principles by states in regional organizations... general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law... invocation of human rights principles in national policy..." and so forth. 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §701 rep. n.2.

domestic laws do not (directly) create claims or obligations on the *international* plane, and so should not be blithely accepted as international usage. Unenforced domestic laws (especially cynically unenforced ones) represent no more a genuine law than do mere condemnations.

D'Amato could, of course, bite the bullet here and say that any customary norm prohibiting torture *has* eroded. But he would be bucking the almost universal consensus - and, given the fact that international law is generally understood to be substantially a matter of consent and consensus, that seems an implausible route.

The consensus on torture seems to be supported by the observation that the torture norm is almost always honored in the breach - nations may get away with torture, but they typically do not defend it. Yet D'Amato's analysis has great difficulty accommodating such a consideration. Consider C's situation in the face of two precedents of *r*-compliance again. D'Amato claims that, if there are two precedents that speak against the legality of C's act, C cannot successfully argue that it is in the *right*. If it *argues* at all, the precedents will defeat it. So, if C refuses to obey *r*, it must go ahead admitting that it is in the wrong, insisting unsuccessfully that it is in the right, or (most likely) go forward silently. In any event, C's noncompliance still undermines the norm, by tipping the balance of practice in favor of future noncompliant states. Torture states are in an analogous position, so their

dissembling or mute torture should still, on D'Amato's analysis, undermine the torture norm. And since claims are *not* acts on D'Amato's view,¹⁹ their protestations of the evils of torture cannot 'cancel out' their acts.

D'Amato's problem is that he has downplayed the *other* 'distinguishing' function of *opinio*, the one that really drives problems like the chronological paradox - the function of distinguishing between mere illegality and norm-creative action. I suspect he does this because his picture of the relationship between articulation and action lets him do little else. On the other hand, he may be following the lead of other writers who deny such a distinction - but he would be wrong to do this.

Many writers seem to be willing to accept the principle that norm-creative actions are initially illegal, but this seems to be an unhappy position at best, and one not entailed by the orthodox test. Cheng, for instance, sees no problem with saying that a state's individual understanding of the legality of its act can simply come apart from the general understanding of the act's legality.²⁰ But his account suffers from two problems. First, he mistakes the *way* in which states are both law-makers and subjects. The fact that, e.g., members of the U.S. congress are law-makers does *not* mean that any one can

¹⁹ D'AMATO, *supra* ch. 1 note 6, at 88.

²⁰ Cheng, *supra* ch. 1 note 22, at 532.

change the law by fiat - even though they have broad discretion, they must be able to justify any claim that the law has been changed by reference to U.S. laws for law-adoption. Similarly for states - the orthodox test lays out the rules under which states can create new CIL norms, and merely having the idea that a new one would be a good idea does not fit those rules. And part of the orthodox rules require that states *not* elide the distinction between the law as it *is* and the law as it *is to be* in the way that Cheng and others who assert that any illegal act is norm-creative seem to do.²¹ As I will explain more thoroughly in the next chapter, to say that some act is illegal *is* simply to refuse to accept it as a grounds for further legal justification, and hence not to give it creative force. For reasons that will become obvious, I do not think we can separate the kinds of norms we are willing to accept as justifying actions from the kinds of norms we are willing to accept as justifying new norms.

D'Amato gets backed into a position that makes no distinction between illegality and norm-creativity in large part, I would suggest, because for all his pragmatism in rejecting a metaphysical account of state beliefs, he is still in

²¹ Cheng also draws the (to my mind) odd inference that the legality of some act can *be* different from each state's perspective. If normativity is to have any meaning, this must be false - what is the case is that different states have different *ideas* about normativity, but the idea of a public system of rules entails that we be able to make reasonable claims on others' views. I will discuss the significance of divergent perspectives more thoroughly in chapter four.

the grip of a descriptivist picture of language, including the language of rules. The function of “articulations” is to *describe* some class of acts which are themselves “concrete and usually unambiguous.”²² Acts of state fall more or less inside or outside the space marked out by the articulations, and the articulations themselves carry no normative weight - it is only when matched with an act that they come ‘alive.’ As a result, a putative legal principle’s only normative impact comes from the cases that fall under it, and D’Amato is left with nothing else to do than count cases. On D’Amato’s view, we can see practice as carrying all the normative ‘weight.’ Articulations merely tell us which side of the scale (if any) to put a particular piece of practice on.

Since articulation is playing a distinguishing role, but *only* a distinguishing role, all the actual weight is on the practice side. This leads naturally to case-counting - all that matters is which way the scale tips, and if I can get away with putting weights on the wrong side, so much the better for me. The only time I will run the risk of being sanctioned for doing an illegal act is if the scale remains tipped against me *after* I freely choose where to throw the weight of my practice.

While this approach lets D’Amato allow for change in CIL, it prevents him from creating a model of *reasoned* or normatively guided change. A state

²² D’AMATO, *supra* ch. 1 note 6, at 88.

that desires change in the law, on D'Amato's view, must reject the normative claim of the law upon its actions in order to proceed. It can take the initiative of articulating a new rule, but cannot defend its actions within legal discourse except aspirationally. A state can say what legal rule it would like accepted, and so pave the way for it to become law if it can get a consensus of action, but it can only give moral, political, or prudential reasons for why it is rejecting all the legal reasons.

Nor can the damage be easily contained to situations of legal change - if the only *reasons* available to a state for violating the law are extra-legal ones ("we didn't think this was a good law (for us)") but such violations are generally accepted, it would undermine the normative claim of all laws. If laws have a genuinely *normative* claim, they need to make a claim that has some force even aside from policy considerations.

D'Amato has really given us only an account of norm-*degeneration*, and not normative change in general. In his ABCDEF cases, 'change' amounts to an erosion of a norm in place. A new norm of CIL absolving states of liability for damage caused by their satellites upon re-entry (*anti-r*) could not arise until and unless there were enough cases that went against *r* to balance out all the precedents that supported it. On D'Amato's model, there are only two sorts of CIL change possible: if there is no articulated rule, or an articulated rule with neither side having the better of the practice, a single act creates a

new legal obligation. On the other hand, if there is already an articulated rule with practice on its side, the only kind of change possible is its eventual destruction through (illegal) resistance. But it seems implausible to think that we must completely break down the normativity of law in some area before it can be altered - that is, we need not move through a 'zeroed' state where there is no normative usage in order to change the law. More often, I suspect, norms more gradually morph into each other without the area ever becoming (even temporarily) unregulated. In fact, I will discuss one such case of apparent change (or, at least, an attempt at change) that does not seem to imply a period of (literal) lawlessness in chapter five.

In order to change a norm in some way other than merely removing it, a state would need, at the very least, a successful 'counter-articulation.' That is, a state (or someone else) would have to make some claim about what new norm it saw its actions as instituting. This is where the distinction between merely illegal and norm-creative action becomes important. Whatever the rules are for introducing an articulation, it would be implausible to allow an articulation that *clearly* contradicts existing rules to have legal effect. But D'Amato's clear and unambiguous acts only permit of two possibilities - either the proposed principle is consistent with existing law, or it is inconsistent. Neither is acceptable, since the principle would either already be law or be ineligible to become law. Dissenting states cannot

successfully *argue*, legally, for their position - the only point at which new norms can be created is when the old ones have already been eroded through (non-sanctioned) resistance. Essentially, if there is a norm in place, there is only illegal action (though, for D'Amato, it may have legal effect).

We need some space for there to be an articulation that does not fall into D'Amato's exclusive categories of describing consistent usage vs. not doing so. This is not to say that we need the norms to somehow both describe the usage and not. But there must be more to the propriety of introducing articulations and their normative influence once introduced than whether or not they describe state acts. Otherwise, we could not make sense of the different imports articulations with different sources have, or of how CIL can develop in the presence of articulated principles that do not accurately describe standing usage. What we lose on D'Amato's descriptive account is the ability for actors to make legally reasoned arguments for normative change - and hence change the law while retaining their commitment to its normative force.

Descriptivism and Pragmatism

Of all people, jurists should be best aware of the true state of affairs. Perhaps some now are. Yet they will succumb to their own timorous fiction, that a statement of 'the law' is a statement of fact.²³

²³ J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 4 n.2 (J. O. Urmson & Marina Sbisa eds., Harvard UP 2d ed. 1975).

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We American Judges have no intelligible theory of what we do most.²⁴

D'Amato's downfall is that he replaces a psychologistic notion of *opinio* with a linguistic, but descriptive, one. As noted above, the *conceptual* difficulty with *opinio* doesn't really have much to do with the mysteries of the mind. The paradox is generated by the assumption that *opinio* somehow mirrors a state existing in the world and makes us aware of it, but does not itself add anything to legal reality. The problem remains whether this mirroring is being done by a psychological state that represents the world, or a bit of language that subsumes some part of it under a description. A description (at least as usually conceived) no more changes its object than a belief does - all a description can show us is what is already there, when what we need is a process that can give us change.

The dominance of descriptivism in accounts of international law actually represents, I would suggest, a rather limited viewpoint on language. Describing is only *one* sort of thing that we do with language, and a sort of 'mirroring' of the world is only *one* part of what we do even when we describe something. When I tell you something about the way, say, my fiancée looks, I do (in some sense, which I have no interest in investigating further here) paint you a linguistic 'picture' of her. But I also do a

²⁴ Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in *A MATTER OF INTERPRETATION* 3, 14 (Amy Gutmann ed., Princeton UP 1998).

tremendous number of other things: I make it possible for you to tell someone else what she looks like. I make it unreasonable for you to believe that she is blonde. I move the air. I may deceive you. I may annoy her, if my description is unflattering. I may reinforce traditional western heterosexual notions of beauty and gender relations, or I may subvert them (or a cigar may just be a cigar, in this case). I may impolitely interrupt what you were saying. And so forth. And that is only what goes along with a speech act that is a description, let alone the myriad of things we can do with language - condemning, warning, promising, requesting, etc. - that are not descriptions of anything at all.

This diversity of linguistic effects has not been lost on philosophers of language. To the traditional study of the *meaning* of words and sentences (considered as abstract objects), philosophers have added (especially in the 20th century) the investigation of the *pragmatics* of speech *acts*. D'Amato focuses (rightly) on the practice of language-use, but he seems to presume that the only sort of thing expressions of CIL could be doing is telling us something about rules (or classifying acts under some description, which is still telling us a rule for grouping them). As a result, his account is ultimately meaning-centered (though it tries to analyze practice, it does so through the lens of meaning) and descriptivist. He focuses on the practice, but his

theoretical tools are still primarily derived from non-pragmatist accounts of language.

There are many approaches to the pragmatics of language, with different concerns and methodologies. I will pursue the line that starts off from the later Wittgenstein, takes something from the analysis of “performatives” pioneered by J.L. Austin, and goes through the pragmatic and inferentialist accounts of Wilfrid Sellars and Robert Brandom. This post-Wittgensteinian line of thought is highly catholic, and does not presume that there is one particular thing that language must be doing (whether ‘telling’ or otherwise), but seeks to investigate the various roles that speech *acts* can play, often bracketing questions of their meaning entirely (which is the course I will take).

What these post-Wittgensteinian accounts have in common is that they make the pragmatics of language their *primary* focus, and do not understand those pragmatics in terms of a prior conception of meaning. That is, they are practice-centered, rather than meaning-centered. This is not the same thing as denying the importance of meaning - I will not here take a stand on Wittgenstein’s maxim that “meaning is use”²⁵ (either on what he meant by that, or whether and in which sense it is true). What I want to investigate is

²⁵ “For a *large* class of cases - though not for all - in which we employ the word ‘meaning’ it can be defined thus: the meaning of a word is its use in the language.” LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §43 (G.E.M. Anscombe ed., Prentice Hall 3d ed. 1999).

rather just what we can say about the pragmatics of CIL-language use *without* talking about its descriptive meaning in any significant sense. The basic model I will propose has its roots in the Wittgensteinian notion of a “language game,”²⁶ which looks at speech acts not under their aspect as carriers of meaning, but as moves within a ‘game,’ a social practice that governs the propriety of using various speech acts and responding to those used by other participants. Because a pragmatic analysis need not be concerned with *metaphysical* questions about what the structure of rules being described is like (because it does not analyze what we are doing when we talk about law as describing rules), it is a promising direction for evading the paradox. If we can get away with understanding customary law change primarily in terms of the pragmatics of customary legal discourse, we may be able to describe that change in a way not subject to paradox. Two questions remain: *can* we get away with looking to pragmatics rather than meaning, without losing something important? And, if we can, what would that picture look like?

As to the first, the reader can be excused for her suspicion - if pragmatics are so helpful here, why hasn't someone used them already? After all, it would be misleading to speak as if lawyers and theorists of law ignored the pragmatics of language completely. Certain esoteric aspects of

²⁶ *Id.* §7.

philosophy of language have not yet made the rounds, but the *performative* is a familiar analytical tool in the theory of law. I will have more to say about performatives in the next section, but performatives are, in a nutshell, speech acts that have some effect in themselves, above and beyond any content they may convey: promises, commands, bequests, etc. Legal pronouncements (judgments, passings of laws, etc.) seem to be *paradigmatic* cases of performative utterances (the idea that “the defendant is remanded without bail,” describes some state of affairs existing independently of the utterance is at least as implausible as the idea that “I promise to pay you tomorrow,” does). So why the lack of pragmatic approaches to the chronological paradox in CIL?

The simplest answer is, I suspect, that articulations of CIL do not *seem* to be performatives, on the surface of things. They purport to do the job of telling, which is generally seen as part of a speech-act’s content-bearing role, not its pragmatic one. On its own, this would seem like a bad reason, as many speech acts do not behave as their surface structure implies they should, and philosophers are rarely shy about accusing speech acts of masquerading as something they are not. If an argument can be made that articulations of moral rules are veiled commands, surely CIL-articulations may be something other than descriptions of rules.

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The stronger reason to avoid analyzing articulations as performatives has to do with the internal logic of their use. Performatives, as 'doings,' have the actlike character of requiring the world to fit them. They may need to abide by certain restrictions on their use, such as hewing to linguistic conventions. And they may fail to have their intended effect. But in essence, they are acts that an agent may choose to take at her own discretion, and their point is straightforwardly to effect some sort of change. By contrast, articulations of CIL get their whole point from being part of how we establish what the norms of CIL *already are*. Their logic seems to be one of describing and conforming to the already constituted world of norms, not of changing it - they seem to have a language-fits-world direction.

Both of these reasons for resisting a pragmatic analysis of *opinio* are mistaken. Not only should we not necessarily take the surface structure of speech acts at face value, it is not even entirely clear that the most important statements of *opinio* - those made by the agents of states - *do* present themselves straightforwardly as descriptions to anyone except philosophers.

It should probably go without saying, but let me say it: most actors in the legal realm, when they talk about what the law is and toss about expressions of legal rules, are not primarily concerned with the deep

questions about the meaning of law or of legal language. The crucial concern for legal actors is usually *what they can, legally, get away with*. An advocate's job is not to find the best conception of the law and then decide if it favors her side of the dispute. Rather, her job is to find a conception of the law that *does* favor her side of the dispute. This need not mean that most legal agents are concerned only with empirical predictions of where the executioner's axe will fall. Far from it - most legal actors are genuinely invested, I would suspect, in working within the structure of the law. The point is just that they are more concerned with how they can manipulate the system, or how far they can push its limits, rather than with discovering its abstract structure (which expressions of the rules, if they describe anything, presumably describe).

It should not be surprising that judges get a disproportionate amount of attention from philosophers of law, since they are the legal actors whose practice most closely mimics the philosopher's dispassionate search for truth. But it would be a mistake to see judges as doing the *same* sort of thing that philosophers and legal theorists are doing when they discuss laws. One important thing to keep in mind about pragmatics is that the same bit of language can be used in different (though, presumably, related) ways. The pragmatic upshot of a judge's citation of some legal rule in a decision is very different from an expression of that same rule in a law journal. Judges are

surely aware of this, and their activity guided by a concern for the impact of their words. So we are likely to be misled if we think of a judge's speech, even in an opinion's *dicta* (i.e., the explanation of the decision, not the articulation of what is to be done with the case at hand), as basically a description of the law that simply happens to have some interesting practical import.

We should be even more cautious about thinking of expressions of legal rules as descriptions in light of two other features of legal discourse, especially international legal discourse. First, while judges do not (ideally) have a direct stake in the outcome of the case at hand, they have their own ideas about public policy. Many judges show clear signs of being motivated by policy visions, if constrained by their understanding of the law.²⁷ Additionally, *international* law has few pure adjudicators. Legal research focuses heavily on ICJ cases and the like, but many of the most important questions of international law never see the inside of a court. Rather, adjudications of most international claims are made by the same creatures who advocate them - nation-states and other entities with the power to

²⁷ For instance, Staci Rosche (Staci Rosche, *Note: How Conservative is the Rehnquist Court?*, 65 *FORDHAM L. REV.* 2685 (1997)) presents and discusses statistical evidence that the U.S. Supreme Court under Rehnquist's leadership has skewed significantly against racial discrimination claims compared to earlier courts (and, implicitly, that this shift should not be seen as evidence of objectively weaker claims being presented).

influence international affairs.²⁸ This does not make the dispute any less a legal dispute - nations are perfectly capable of debating the legal merits of a case without the intervention of a judge.

The strategic character of most legal discourse should let us be confident that, in focusing on pragmatics, we are not missing the heart of the law. But even if we do so, this leaves the problem of the apparently backward-looking character of rule-expressions. Rule-expressions certainly *look* like they have expression-fits-world direction of fit - and certainly they do not have world-fits-expression direction of fit. In fact, this is a pseudo-problem: our choice is not between descriptions that hew to the world and acts that are at the whim of the actor. The two options presented by the direction-of-fit metaphor are not exhaustive of the possibilities, but to see how we need to drop the metaphor and look more carefully at linguistic practice.

What we need is just a more sensitive picture of the pragmatics of rule-*expressions*. There *is* a big difference between a judge (or state) saying, "Britain, remove your ships from the Corfu Channel," and saying "no state

²⁸ Thomas Franck's suggestion (Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION 204, 228 (J.L. Holzgrefe & Robert O. Keohane eds., Cambridge UP 2003) that the UN Security Council and General Assembly, as well as the court of "public opinion" play a role in international legal disputes analogous to that of a jury of peers in a domestic system is seriously inapt on this account.

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may impinge upon the sovereignty or territorial integrity of another.” But the difference is not between a performative or otherwise ‘practical’ utterance and something else entirely. The difference between the two kinds of speech act is precisely a difference *in* the pragmatics of their use. Given a sufficiently sophisticated picture of how the pragmatic import of rule-utterances work, we will be able to analyze *opinio* - the *use* of legal rule-expressions with regard to state behavior - in a non-paradoxical way. Painting that picture is the task of the next chapter.

IV: Messy Pragmatics

In the last chapter, I discussed D'Amato's non-psychologistic approach to *opinio*, and described why it fails even though it correctly leaves the mind behind for the word. The problem, I have suggested, is that even though D'Amato's theory gives more credence to actual CIL discourse, and is at least weakly pragmatist, he ultimately sticks to a descriptivist model of how rule-language works. In this chapter, I will make good on my further suggestion that we look for an analysis of *opinio* - and, ultimately, of CIL change - more firmly grounded in the pragmatics of language.

The model I will endorse makes much of the non-descriptive character of CIL expressions. Traditional performative analysis will give us a good head start on a workable theory, but will need to be loosened up to do the job. After giving some thought to normative *practices* more generally, it will be possible to properly situate expressions of law in particular. This will let us see how, properly understood, there need be no paradox in the idea that CIL norms can change, even though they are always justified in terms of previously accepted norms.

Two Views of Performatives

Understanding *opinio* as a kind of “performative” speech act – that is, thinking about states as *doing* something when they make pronouncements about CIL – is a start. But that is, of course, only the barest hint of an account. To flesh out the idea, it will be helpful to start by examining two traditional accounts of how speech acts function as performatives: J.L. Austin’s and P.F. Strawson’s. Ultimately, neither is entirely adequate. But their drawbacks will point us in the direction of a more workable model.

Austin (and many philosophers of language following him) makes a distinction between the “locutionary,” and “performative” forces of the speech-act. Locutionary force is what I have been calling the ‘descriptive’ use of language – the locutionary aspect of a speech act is its purport to describe the world and its claim to truth (or at least to warrant).¹

“Performative” force falls into two classes – the perlocutionary and the illocutionary. Austin noticed that sometimes utterances accomplish things solely through their causal effects on the world – they are actions like

¹ Sometimes Austin seems to use “locution” to cover all speech acts as wholes (AUSTIN, *supra* ch. 3 note 23, at 94), and reserves the term “constative” to cover the truth-claiming aspect of speech (at 3). At other times he uses “locution” in a fashion that contrasts it with the performative aspects of language use (e.g., at 101-102 and 109). Because ‘locutionary, illocutionary, perlocutionary’ form a natural-seeming grouping, I will follow Austin’s latter usage and use “locutionary force” to mean the descriptive or more generally truth-claiming elements of speech acts.

anything else - and not through their meanings (in any sense of the term). So, for instance, I can make you afraid by saying (with an appropriate sneer), "I know where you live." The main point is not to inform you that I know where you live - the threat would not be less effective if you already knew that I knew where you lived. And I could achieve the *same* effect by, say, cracking my knuckles, or showing up on your doorstep one evening. Utterances have a *perlocutionary* force to the extent that they are being used to bring about some causal consequence.²

No sane theorist would deny that speech acts may have causal effects, but *illocutionary* force is an insight we largely owe to Austin (at least for thematizing it and making it somewhat clear). There are uses of language that are not clearly statements of fact, nor do they clearly operate to bring something about through causal agency. Rather, they themselves *are* actions of a particular kind.³ Promises are the classic example. If I say, "I promise I will pay you back," I am not (at least not primarily) stating a fact (not even the fact that I promise). Promising something is not the same as intending or predicting that I will do it, or any other close cousin that could be done without reciting the formula (or some symbolic equivalent, such as shaking hands on a deal). Even were we to treat, "I promise...", as *also* stating a fact,

² *Id.* at 107.

³ *Id.* at 99-100.

it could not do that job except for its role in creating the fact of the promise. There seems to be no act I could undertake or state I could be in that would be a promise without involving the use of the formula or some symbol. At the same time, saying "I promise..." doesn't *bring it about* that I promise. It *is* the promising, and need have no further effect to be a promise. After all, it is not as if someone could somehow intercede, and stop the promise from happening a split second after I say the words - as we would expect, if promising were a matter of perlocutionary force.

In Austin's schema, illocutionary force is dependent on *conventions*.⁴

For example, what makes a promise a promise is that we accept⁵ a rule to the

⁴ *Id.* at 14.

⁵ This is a bit of a reconstruction of Austin's position, as he is not entirely explicit about the *way* in which illocutions depend on conventions. However, even this gloss involves a significant fudge - what is it to 'accept' a rule or convention? Is it something like tacitly promising (which would get us involved in an explanatory regress - though note that not all forms of normative binding need function like promises)? My reading is influenced by Searle's expansion on Austin's theory (see generally JOHN SEARLE, *SPEECH ACTS* (Cambridge UP 1969)). The problem of the status of 'accepting' conventions or rules shows up most forcefully in Searle's attempt to use conventions to show the possibility of moving from an 'is' to an 'ought' (e.g., as when we derive "he is obligated to X," from, "he said 'I promise to X.'"). For Searle, there is no fallacy because the normativity of the promise piggybacks on the commitment to follow the rules of English that define promising (at 177). But the problem re-arises with respect to the normativity of the rule - if it is just a matter of *de facto* agreement (as Searle implies when he calls the promising rule an "empirical fact about English usage," or when he earlier says that "[t]he activities of playing football or chess are constituted by *acting in accordance with...* the appropriate rules" (at 33-34, emphasis mine), promises still look non-normative. If, on the other hand, the acceptance of the rule itself has some normative character, that needs to be explained (and obviously not by appealing to the fact of agreement and assuming that we have an obligation to follow agreements). It may be true that there is no problem in deducing an obligation from an English speaker's saying "I promise..." but I do not think we will be able to say what it is to be an English speaker (as opposed to an utterer of English phonemes, like a parrot) without recourse to some normative concepts - similarly for what it is to be a player of football or a participant in international legal. We could, of course, assume that there is a brute level of inherent normativity

basic effect that when anyone says or writes, "I promise that I shall X," we will take them as obligated to X (yes, *ceteris paribus*). In general, without a rule saying that some utterance will count as a particular sort of act (one defined by the conventions of our social practices), the utterance cannot have an illocutionary force. Any natural effect (making someone afraid, deafening someone, bringing them joy, etc.) could just as easily be accomplished through non-linguistic means, and we can imagine circumstances in which the speech act would not have that effect, and so must be distinct from the language use (i.e., if it is brought about through language, it must be in a perlocutionary way). So illocutions, on this view, must be actions that have 'artificial' effects - they are conferrings of status within some system of rules or conventions that says what certain speech acts count as. But this is precisely the kind of structure that CIL does *not* have - it is defined by being the sort of law in which there are not well-defined meta-rules telling us which acts create laws. Even on the most straightforward reading of the orthodox test, there is nothing any *individual* state actor can do, unilaterally, to

(perhaps including an obligation to follow agreements), and that the constitutive conventions on which illocutions depend are part of this - in which case it may be more precise to say that we simply 'have' the rules instead of saying that we 'accept' them. But I think the better moral to draw is that thinking of accepting a convention or being committed to the rules of a game as a *status* is not a fruitful direction in which to go. My view will ultimately be based on a different model that I do not think is available to Austin and Searle, that many illocutions get their normative grip from rules, but that rules are ultimately *also* illocutions which the practice counts as justified or not on a case-by-case basis; but, I have not yet laid the groundwork to defend this view.

change the pattern of legal statuses, since the legal effect of its action will depend on the (non-conventional) actions of many other states.⁶ In other words, there is no act or class of acts that generally and simply *counts as* making new CIL. The only explicit rules for CIL tell us how to *identify* the law, but not how to create it - and seem to rule out there being any rules for creating it. And so it looks as if we cannot understand *opinio* as a matter of Austinian illocution, if it is to do what we need it to.

On the other hand, taking statements of *opinio* as perlocutions would be unsatisfactory for other reasons. This is, more or less, what realist models of law do. As mentioned in chapter two's discussion, the only question the realist considers worth asking is, "what are the causes and effects of this particular use of legal language?" However, we have been putting this complete skepticism of normativity off as a last resort. Accepting realism of the strong sort would prevent us from achieving one of our goals, which is to give an account not just of the process of change but of the norms that guide it.

⁶ Nor would it be possible, I suspect, to give an illuminating general *rule* for how groups of states could bring about change. We know that they can do it by bringing general practice into line with the newly articulated rule - but this is just what it *is* for the rule to be changed. There is no formula or standardized action that has norm-changing effect, even for the entire community of states; what will change the law depends on the particular change sought. If we try to extract the content of the change from the rule for making the change (as I can extract the particular promise from the formula "I promise to X"), we are left with a vacuous rule - go bring about the change in the rule-bound practice.

What we seem to be left with, if we want to keep any normative import for legal language in CIL, is that state declarations on the subject of customary law have standard locutionary force. But this leaves us with only unsatisfactory views like D'Amato's version of articulation. The central problem is that if we accept the view that illocutions are 'artificial' and require established conventions to work, the legal discourse can only report on the law, not really form part of it, on pain of rendering legal discourse non-normative.

Fortunately, there is another account of illocutionary force, one that gets away from Austin's near-exclusive focus on conventions.

Strawson notes that Austin's picture of illocutions as always and everywhere conventional is too limiting. There are many speech acts that seem to carry illocutionary force but which do not hew to any clear convention;⁷ his own examples include warning, entreating, and objecting. If

⁷ Except, perhaps, the conventions governing the meanings of the words used. There is rich and interesting debate about whether or not meaning, what would be called 'locutionary force' on Austin's schema, is conventional (see for example DONALD DAVIDSON, *Communication and Convention*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* 264 (Oxford UP 1984) (arguing that meaning could not be conventional), MICHAEL DUMMETT, *Truth*, in *TRUTH AND OTHER ENIGMAS* 1 (Harvard UP 1978) (arguing that there is convention that identifies assertions as truth-claimants), and ch. 5 of DAVID K. LEWIS, *CONVENTION* 160-202 (Blackwell 2002) (outlining a general theory of meaning in terms of social conventions)). I do not think I need to settle the issue here (nor do I want to). I trust that we all understand, at least in an intuitive sense, that there is a convention involved in promising - "saying 'I promise X' shall bind you to X" - that goes beyond any convention to the effect that the sigil PROMISE shall be used to denote certain kinds of voluntary agreements.

you are about to skate out onto thin ice, and I say, "the ice is thin," I have *warned* you, and my utterance is itself the act of warning. But it's not clear that there is any convention here. It is simply not the case that all utterances of the formula 'the ice is thin' are warnings. You might try to specify the context further - say, it is a warning when spoken by someone not on the ice to someone who is, etc. - but then we begin to lose our grip on what makes this an instance of a *general* convention of warning. Similarly, if you say that Superman is the greatest member of the Justice League and I say, "Batman is clearly superior," I have *objected* to you, despite the lack of any clear convention governing my act.⁸ Nor are these matters of perlocutionary force - warning you is different from bringing it about that you become cautious (warnings may not be heeded, after all); it is the normative act of *making a claim upon you* that you become cautious, saying that you *ought* to be cautious (and would be, even if I knew that it would not *cause* you to take care).

Austin does take up the problem of non-conventional illocutions, after a fashion. He actually claims that speech acts may have illocutionary force even if they do not conform to a convention, so long as they *could* be restated

⁸ P.F. Strawson, *Intention and Convention in Speech Acts*, 73 PHIL. REV. 439, 444 (1964). Strawson uses a more abstract example of objecting.

in a way that *did* conform to the convention.⁹ So, I *could* give you the very same warning – that is, perform an act with the very same illocutionary force – by saying, “I’m warning you, that ice is thin.”

But, as Strawson points out, this isn’t quite the same thing as saying that all illocutionary force is governed by conventions. At best, it’s saying that all acts with illocutionary force *could* be carried out through adherence to conventions.¹⁰ I would prefer not to dwell on this point, though – we may have a conventional use of “I warn you that X,” but I think we are already in even worse straits with monsters like “I object to you that X” or “I am threatening you that X.” A suitably motivated philosopher might want to institute such conventions, and you could probably make yourself understood when using them, but I think Strawson is right that there are many illocutionary utterances that are not governed by conventions, and we gain no significant theoretical ground by imagining conventions that could govern them.

Strawson’s alternate approach takes its cue from Austin’s emphasis on the importance of ‘securing uptake’¹¹ for an utterance with illocutionary force. There are many ways in which an utterance might *fail* to secure uptake – to be understood and reacted to by some target audience (e.g., I

⁹ AUSTIN, *supra* ch. 3 note 23, at 103.

¹⁰ Strawson, *supra* note 8, at 445.

¹¹ AUSTIN, *supra* ch. 3 note 23, at 115-116.

might make a will that no one reads, but I have nonetheless bequeathed something) - but it is crucial to the illocutionary force of a speech act that it be *intended* to be heard and understood.¹² I may still have commanded you even if you happen to have walked out of earshot by the time I issue my directive - but I am confused or insane if I try to issue commands when I *know* you cannot hear me, or to no one at all.¹³ This makes illocutionary force different from locutionary and perlocutionary force. I can, in principle and on the standard picture, make true assertions for no one to hear, and *causally* affect people with words they do not understand.

Strawson provides a roughly Gricean alternate analysis of illocutions. To issue a speech act with illocutionary force is to make an utterance with four interlocking intentions: (1) the intention to produce a response *r* in an audience *A* by the utterance, (2) the intention that *A* recognize one's intention (1), (3) the intention that *A*'s recognition be part of *A*'s reason for responding by *r*, and (4) the intention that *A* recognize your intention (2).¹⁴ So, for instance, my threat works because I intend it to frighten you (1), I intend that you know I am trying to frighten you (2), you are frightened in part by realizing that I intend to frighten you (3), and that you realize that I want you to realize that (4).

¹² Strawson, *supra* note 8, at 448.

¹³ I may be able to issue commands to no one in *particular*. This is an interesting question (that bears on legal interpretation) that perhaps I will be able to take up in another life.

¹⁴ Strawson, *supra* note 8, at 446-447.

However, Strawson himself realizes that certain illocutions that are easily analyzed on Austin's account escape such easy analysis on his Gricean modification. For instance, to say "don't go" as an *order* rather than a request requires reference to established societal norms and hierarchies (or at least an attempt at reference, if I am not in fact authorized to give you orders).¹⁵ Most of Austin's clear examples have this property of connection to social structures - promises, verdicts, marriages, etc. Such conventional illocutions have two important features. They can sometimes be completed *unintentionally*, though unintentional invocations of convention will be defective (as almost all unintentional acts are).¹⁶ Nevertheless, many not-fully-intentional illocutions are defective of their kind, not a different kind of act entirely. And, they are *infallible* - I cannot fail to perform the act I undertake to perform if I follow the conventions.¹⁷ If you do not understand that my words are intended to frighten you, I have failed to threaten you. But if you do not understand that my saying "I do" marries us, the problem is with your understanding, not with my act. Similarly, if I say "I promise" in the right way, nothing can intercede to stop my promise from taking effect.

Strawson's strategy is, essentially, to split the difference. All illocutions share the properties of overtness and avowability - their felicity

¹⁵ *Id.* at 455.

¹⁶ *Id.* at 457.

¹⁷ *Id.* at 458.

depends on their ability to be understood as what they are. Beyond that, they simply lie on a continuum from those that are wholly conventional to those that are wholly dependent on the uptake of intentions.¹⁸

I find Strawson's concerns compelling, but his ultimate strategy unsatisfying. Despite appearances, neither Strawson nor Austin has a particularly deep theory of how illocutionary force *works*. Austin is right that it seems to have something to do with social conventions, and Strawson is right that it seems to have something to do with the way people react to our speech acts... but ultimately they both founder on the question of *how* conventions and intentions can effect the changes that illocutionary force effects.

Conventions, Rules, and Practices

"How am I to obey a rule?" - if this is not a question about causes, then it is about the justification for my following the rule in the way I do.¹⁹

The dichotomy between rigid conventions and one-off uptakes is too limiting. To see an alternative we should look more carefully at the notion of "convention" than Austin does. Once we do this, we will be able to see how

¹⁸ *Id.* at 460.

¹⁹ WITTGENSTEIN, *supra* ch. 3 note 25, §217.

Strawson's account presses in the direction of supplanting the notion of a *convention* in the analysis of performatives with the looser notion of a *practice*. We will then be able to situate the conventional aspect of speech acts in a broader model that will let us get a grip on the ways in which *opinio* is fruitfully *unconventional*.

There are at least two ways in which we can understand conventions – a “regularist” one and a “normative” one. A regularist understanding of conventions takes them to be regularities of behavior with respect to some speech acts. Austin sometimes seems to talk about conventions in this way,²⁰ and it is the sense of “convention” appropriate to Lewis' seminal analysis of the concept.

Like Finnis, who draws on his work,²¹ Lewis is interested in rules/conventions as solutions to coordination problems. Lewis describes the way in which we can achieve coordination through “shared acquaintance with a regularity.”²² A convention, for Lewis is just such a regularity, to which everyone prefers to conform (and expects everyone else to conform).²³ The philosophical regularist like Lewis need not describe conventions the same way that, say, an anthropologist would (though an anthropological description

²⁰ “... we may reasonably ask whether there can be [for a convention] any sense to ‘exist’ except ‘to be accepted’, and whether ‘be in general use’ should not be preferred to both.” AUSTIN, *supra* ch. 3 note 23, at 26.

²¹ FINNIS, *supra* ch. 2 note 36, at 256 n.IX.3.

²² LEWIS, *supra* note 7, at 41.

²³ *Id.* at 42.

of social regularities would be a *kind* of regularist account of conventions) - for instance, she may be more interested in idealized regularities than simply cataloguing what is actually done. But so long as a theorist is concerned with describing and explaining regularities of use, she is approaching conventions from a regularist direction. Lewis' account is deep and interesting, but because of his focus on detailing the way special *regularities* can arise, it is orthogonal to my concerns here.

This is not the only way to think of conventions, however, and it is not the only way that Austin makes use of them. "Convention" can also be understood *normatively*, as something to which we can appeal to defend a particular speech act. It is one thing to say that sanctions generally befall anyone who says, "I promise to X," and then fails to X - or even to say that, if everyone were living up to their moral obligations, everyone would do everything they promised to do. It is quite another to say, when someone asks why you are about to slap them for failing to X, "you promised to X!" In this latter case, "conventions" function as a special kind of justification or explanation of behavior. Unsurprisingly, given the descriptive nature of regularist models of convention, I think that the normative notion of convention is the important one for illuminating the pragmatics of *opinio*.

One reason that theorists like Austin (and, following him, Searle) may have been happy to lean so heavily on the idea of convention without making clear with which side of the distinction they were working is that they may have thought that this is a distinction without a difference. Of course describing a regularity and appealing to a convention as a justification are two different activities, but if your justification *is* a description of a regularity, then what's the big difference? The normative and regularist concepts of convention, while related, are not quite so interchangeable as this, though.

Wittgenstein in particular was alive to the difficulties in moving between our ability to follow and obey rules²⁴ (i.e., treat them in a normative fashion, as calls and/or justifications for action), and behavior that happens to be in accord with some described regularity. He offers the following

²⁴ Wittgenstein uses the term "rules," while Austin focuses on "conventions." In the normative sense of convention, as I have described it, I think they are closely enough related to be treated together. When we appeal to conventions normatively, we generally cite some directive for action (in other words, a rule) that we take to justify or explain the action at hand. In that sense, I think that Austin could just as easily have talked about the promising *rule* as the promising *convention*. One way in which conventions may differ from rules is that we sometimes talk about *sets* of rules as conventions (e.g., the convention of football-playing). But justificatory appeals will generally be based on (or could be cashed out as) appeals to particular rules within the convention (the penalty flag is thrown because of the convention of football in general, but because of the offside rule in particular). And Lewis is probably right that not all rules are conventions or conventional (*Id.* at 100) - but the major distinction he makes is in terms of the reasons we have for adopting rules and the kinds of obligations those rules impose. The distinction is important, but not I think to a discussion of the formal properties of rules or conventions and their ability to impose any obligations whatsoever. The properties of conventions and rules may diverge more sharply when we are talking about them in their descriptive senses - but since I am concerned with the normative sense of rules and conventions, I will not be overly cautious of the distinction.

example to illustrate:²⁵ suppose that someone writes down a sequence of numbers, and then under those numbers writes down their squares. What could it mean to say that she was *obeying*²⁶ the rule of squaring, in a sense distinct from her actions merely being consistent with it? No mental 'twinge' or intermediate calculation (e.g., writing down "1x1" under the "1") would be sufficient, since there might only be an accidental connection with the rule. In order to definitively identify her actions as involving the rule of squaring, an *expression* of that rule must somehow be involved in the process - say, if she wrote down "1²" under "1." Wittgenstein mentions the possibility of an algebraic expression, but of course there are others - she could write, (between the two rows of numbers) "now I shall square the above numbers" or even think to herself, "OK, now square them."²⁷ And, while Wittgenstein focuses on what could be done before or at the time of writing down the squares, we also might accept retrospective evidence - "how did you get the lower row of numbers?" "I squared the upper row." In cases where no expression of the rule is in fact used, but where we think that

²⁵ LUDWIG WITTGENSTEIN, *THE BLUE AND BROWN BOOKS* 13 (Harper & Row 2d ed. 1960).

²⁶ In everyday English, saying that someone has "followed" a rule is ambiguous between saying that she has done what the rule requires and that whatever she has done, she's tried to do what (she believes) the rule requires. To avoid confusion, I'll use the term "obeyed" to indicate the second sense. To obey a rule (in this sense) is to take it as requiring your act (i.e., as making a normative claim on you, and potentially justifying your action).

²⁷ Importantly, this requirement that an expression of the rule be involved is *not* intended as a behavioristic one. The rule-use may only happen 'in my head' - the point is that we should not be prepared to impute to someone an instance of rule-following unless we are willing to impute the *use* of a rule to her.

the person *could* express the rule if need be (perhaps she has expressed it in the past - or perhaps we just take her to be the sort of creature that could express the rule in principle, as, say, a horse trained to count objects could not), we are perhaps justified in understanding her as obeying the rule, though almost always with a lesser degree of certitude than if she does in fact use a rule-expression (I might write down a sequence of the first numbers that come into my head and it could simply turn out to be a series of numbers and their squares, even though I *can* state the squaring rule), and such attributions of rule-following will have a derivative character.

The point is that the express invocation of rules does a job that is *not* done merely by the availability of descriptions of regularities. The *act* of expressing a rule has its own practical import (that goes beyond simply telling us that the regularity is there). So proffering an account of regularities in a practice will not do the job of explaining how conventions work normatively.

Performative Force and Normative Practice

The 'heavy lifting' conventions do for an account of illocutionary force is done by the normative sense of convention, rather than by conventions in the regularist sense. Now it's time to look at *what* the practical import of

rule-expressions is. I will argue that their primary effect is the way that they change the normative status of other acts.

Acts with illocutionary force, rule-expressions among them, have a very specific sort of effect, different from most acts. Growling at you may *cause* you to be scared, but threatening you makes it the case that you *ought* (*ceteris paribus*) to be scared. Similarly, promising you that I will do something doesn't necessarily make it the case that I'll do it; rather, it makes it the case that I *ought* to do it. Successful, felicitous speech acts with illocutionary force are acts that change our *normative* statuses.

No amount of description of regularities will let us understand this normative impact, because no regularity is *inherently* normative. "Conventional" illocutions, like promises, get their normative force from conventions in the sense that citing the rule *justifies* their use. Merely saying that you should do what you have promised to because all the cool kids are doing it doesn't help - but saying that you should do as you have promised because the rule is that you ought to keep your promises does.

Conventions, in the normative sense, are really themselves a species of speech act, with a normative impact (like any utterance with illocutionary force) - that is, when we are concerned with the normative use of conventions, we are really concerned with convention-*expressions*. If I promise to do something, and you call me out on not doing it, your expression

of the promising convention is a challenge that *demand*s a response from me (on pain of it being the case that I ought to admit I was wrong and make amends). We can use expressions of rules to challenge, justify, explain, and excuse - all of which are changes in the normative status of another's acts.

Of course, understanding things this way is a bit of a problem for the Austinian analysis. If convention-expressions (at least in the cases important for explaining performative force) are *themselves* operating via illocutionary force, they cannot do the work of *explaining* illocutionary force. We justify (e.g.) individual responses to speech acts by citing the rule. And we often justify citation of the rule by citing *another* rule - but the chain of citation has to stop *somewhere*.

This is just a version of Wittgenstein's (in)famous 'regress of rules' argument.²⁸ To recap the argument briefly: if we ask how someone knows what a rule requires of him, it is natural to respond that he can produce an "interpretation" (Wittgenstein's word) of the rule that guides his action - in my jargon, when asked to justify an action as a response to a rule, he can cite another explicit rule-expression. But this is a vicious regress, since each new explicit interpretation seems to stand in need of interpretation, etc. So there must be some way of obeying a rule that does *not* involve producing an explicit interpretation (i.e., another expression of a rule).

²⁸ WITTGENSTEIN, *supra* ch. 3 note 25, §201.

This argument has been taken by later Wittgensteinians (myself included) to entail that any system that includes explicit rules must 'rest' upon an ability to judge individual acts as right or wrong, case by case. Expressions of rules are just more acts - in any series of appeals to rules, we must eventually find some rule that we are willing to accept (or not) without any further explicit citations of rules. This does not necessarily mean that there must come some point at which there are no further rules to which we *could* appeal - but asking for and giving justifications is a series of *acts*, and any series of acts must come to an end. In terms of epistemology, there may be some foundational rules beyond which no appeal is possible, or there may not be - for the moment, I will remain agnostic on that point. In terms of the *pragmatics*, it does not much matter - we are concerned with how legal agents can actually navigate acts of challenge and response, a question we can raise without settling the epistemological controversies. What matters is where agents *actually* stop, more than where they must, even if there is such a place where our spades are turned.

In order to understand what Austin and Strawson are on to, and why they each only get part of it, we need to situate the Austinian account of conventions within a broader notion of *practices*. A practice, as I will use the term (roughly following Sellars and Brandom, and in a similar sense to Wittgenstein's "language game") is first and foremost a social phenomenon, a

system of behavior involving a number of participants interacting through time, and exhibiting some degree of regularity. What distinguishes a practice from a simple aggregation of behavior is that participants take a *normative* attitude towards each others' behavior (assigning, or at least being prepared to assign a normative status to each act undertaken), and engage in (what they regard as) sanctioning responses to that behavior.

My goal in this essay is not to ground a theory of normativity, but to try to understand how the particular sorts of problems posed by understanding CIL in particular as a normative system can be dissolved. So, if you do not accept that we can have social practices in which we meaningfully take others' actions to be justified or not, I apologize for wasting your time up until this point. For those who *do* accept a notion of normativity, my claim is that the most basic 'level' of normativity is one-off reactions to individual acts, and that rule-expressions are most fruitfully regarded as speech acts among others, rather than as a special sort of entity that passively reflects the 'real' structure of the practice. I will have very little else to say on why we should accept this view than what I have already said - Wittgenstein has already written the Philosophical Investigations, and much better than I could have.

Disclaimers aside, we can now get some perspective on the relationship between the Austinian and Strawsonian accounts. Both of them are limited

by missing this Wittgensteinian point - they seem to think of normativity as always and everywhere a matter of rules. As a result, Strawson gets away from conventions and rules, but cannot take performative force to be anything but a matter of how we happen to intend and receive speech acts. This leaves him with problems about how to explain what goes on with speech acts (like the "I do" of marriage) that seem to outrun what the individuals involved want out of them. Austin, for his part, has an account that cannot deal with the less formal sorts of illocutions that concern Strawson. If we grant that we can have *practices* where individual acts can be taken as normative in their own right, things shake out a bit more nicely. Individual acts can have normative import (and hence, illocutionary force) - though we should understand the required 'uptake' in terms of taking certain responses to be called for, rather than primarily in terms of recognizing the speaker's intention in calling forth those responses (think, for instance, of unintentional insults). However, a linguistic practice may also provide for speech acts whose normative import is more rigid and better able to be subjected to conscious control because their justification is linked to explicit invocations of rules.

The Pragmatics of Rule-Expressions

In the last section, I argued for two claims. First, when we are concerned with the way rules or conventions support illocutionary force (on my analysis, the way they change the normative status of other acts in the practice), we should look primarily at rules in their normative rather than descriptive sense - that is, at rule-expressions as speech acts with normative import. Secondly, I claimed that rule-expressions do not have any *special* status with respect to pragmatics - they are just speech acts that have a particular sort of normative impact on participants, and a particular set of conditions under which it is justified to issue them (that is, they are not deeply different from promises or threats).

Still, rule-expressions are interesting because they have *some* distinctive features (even though one of them isn't generally describing regularities in the practice). The task remains to explain what is distinctive of rule-expressions as a class of speech acts, and how that helps us solve the chronological paradox. In terms of this analysis, we can re-think the paradox a little. What we are really concerned about, in analyzing CIL discourse, is how to change which rule-expressions are justified. The answer has to do with some peculiar properties of rule-expressions in general, and the subclass of *opinio*-expressions in particular. In this section, I will begin the project of explaining how a pragmatic focus lets us avoid the appearance of paradox in

CIL change by situating law-expressions in a normative/pragmatic account of speech acts.

The Austinian tripartite distinction between locutionary, illocutionary, and perlocutionary force is a bit too crude for this task. In terms of pragmatics, we are almost entirely concerned with what Austin would call illocutionary force, the way in which a speech act changes the normative status of other acts.²⁹ But there are many different sorts of speech acts, all of which have some illocutionary upshot, and it pays to try to impose some structure on the differences between, say, promises, threats, entreaties, and rule-expressions.

Rebecca Kukla and Mark Lance present a useful taxonomy for thinking of the normative relationships between speech acts.³⁰ Every speech act has “input” and “output” proprieties. On the input side, there are conditions on when an act is justified, usually cashed out in terms of what other acts (speech and otherwise) an agent must perform to be entitled to the act in question. For instance, if I can roller-skate, and know this, I am (*ceteris*

²⁹ There are certainly interesting things to be said about the connection between locutionary force (meaning) and pragmatics, but I will not try to say them. Brandom’s entire project is, for instance, a matter of trying to explicate meaning in terms of normativity and pragmatics (see generally ROBERT BRANDOM, *MAKING IT EXPLICIT* (Harvard UP 1994)). My point has been that, especially given the strategic character of legal discourse, we do better to look at the pragmatics directly and bracket any questions about meaning and reference.

³⁰ Rebecca Kukla & Mark Lance, ‘Lo!’ and ‘Yo!’: Explorations in Pragmatism and Metaphysics (2005) (unpublished manuscript, on file with the author).

paribus, at least) entitled to say, "I can roller-skate."³¹ On the output side, (justifiably) undertaking the speech act affects the speech-acts to which others are entitled. If I can roller-skate, then anyone who says, "Daniel can roller-skate," is saying something *true* - even if they are just stringing random words together.³² But in terms of the normative pragmatics, not just truth and semantics, that's not enough. A person may say this but not have access to any speech act that would serve as a *justification*. One way he might find himself in possession of such a justification would be if I had said, "I can roller-skate." Then, if called upon to justify his saying, "Daniel can roller-skate," he could say, "Daniel *said* he could roller-skate."³³ From the standpoint of truth this may not be all that exciting, but from the standpoint of the pragmatics of justification (including the normative use of rules) it is crucial. *My* speech act can make it appropriate for *others* to use speech acts they otherwise would not be entitled to - the differences it makes to the propriety of others' acts is its set of output proprieties. Which *kinds* of speech acts different utterances grant entitlement to is an important distinguishing feature between kinds of speech acts.

³¹ I am indebted to Matt Burstein for this example.

³² I'd rather not get bogged down in the question of whether or not, e.g., a parrot who made those sounds would be saying something true, as it's not important to my point - any creature in general capable of making true claims would be making a true one here.

³³ Of course, this is not the *only* way one could justify the claim - he might have seen me roller-skate, or have some general knowledge about my grace and agility, etc. The point is just that my speech act provides him with an avenue of justification he otherwise would not have had.

Within input and output proprieties, some are idiosyncratic and others are universal. Universal conditions, if they hold for any participant in the discourse, hold for everyone.³⁴ For instance, if it is warranted for *me* to say “Daniel can roller-skate,” you, or anyone else, can secure warrant to say it. On the other hand, idiosyncratic conditions hold only for a specific individual or individuals. If I say, “move your car,” the output is idiosyncratic and obligates you, and only you (if anyone) to move your car. If I wanted to obligate someone else, I’d need to issue a new command (they couldn’t ‘secure obligation’ to this one). In the case of commands, the normative import is fairly intuitive - you are not obligated to move your car unless and until someone with the proper authority tells you to (barring some independent source of an obligation to do so). We can see the operation of the idiosyncratic output in other sorts of cases, however, like moral expressions. Just as not all *true* statements we could make are statements

³⁴ There is a caveat needed here, especially in the case of international legal discourse. Universality is only universality amongst participants in the practice. For instance, if I say that, after a fumble in football, anyone can pick the ball up, I mean any *player* - “anyone” does not include spectators who may run onto the field. In the case of international legal discourse, who is ‘in’ and who is ‘out’ is an interesting question that I will totally fail to answer here. Paradigmatically, authorized representatives of recognized states are ‘in.’ This captures the fact that advancing some putative rule in a law journal (e.g.) has a very different practical import than saying it as an authorized representative or writing it in a treaty does. However, there are some *very* gray areas in terms of international law - such as whether representatives of powerful NGOs are really ‘out,’ or whether all states’ speech acts are really on equal normative footing. Ultimately, while these questions are relevant to a full account of how CIL develops, I do not think answering them is important to solving the paradox in particular. The paradox would arise even if we had a clear demarcation of who was a full participant in CIL discourse and who was not.

we could justify, we cannot necessarily justify our actions just because they are *actually* morally right. If someone tells me, “you oughtn’t flay babies for kicks,” her speech act provides me a new avenue for *justifying* my abstention from baby-flaying (“she told me it was wrong!”) even though it presumably does not change the morality of baby-flaying. Even though everyone is prohibited to flay babies, the speech act gives *me* a new kind of justificatory move.³⁵ In terms of the pragmatics, these changes are all of a kind - moving cars, making justificatory moves, and flaying babies are all acts, and making certain speech acts can affect their proprieties. What distinguishes (e.g.) commands from statements of morality is the *kind* of acts they grant or bar entitlement to. A command obligates me to the commanded act and entitles me to appeal to the command for justification; a statement of morality entitles me to a new avenue of justification, but does not change my entitlement to the act it describes.

Given these basic distinctions, we can identify a number of interesting classes of speech acts. Kukla and Lance, for instance, mark out as “observatives” those speech acts that have idiosyncratic inputs (only if I myself am seeing the cat can I say, “lo, I see the cat”) but universal outputs

³⁵ The “you” is important. Saying that “no one ought to flay babies for fun” would have a universal output. We move from the individualized norm to the universal one so easily because of a background presumption that moral norms are not keyed to individuals (and making that justificatory move in the discourse would require appealing to that rule, if challenged), not because of something inherent to speech acts.

(nonetheless, everyone can now secure entitlement to “Daniel saw the cat”) and “imperatives” (commands) that have both idiosyncratic inputs and outputs.³⁶ I leave the full categorization of linguistic things great and small to them. I am primarily interested in using this framework to think about the structure of normative relations that rule-expressions stand in with respect to other speech acts. In Lance and Kukla’s scheme, rule-expressions of the sort that concern us in international law theory are a sub-species of *prescriptives*, a class of speech acts that share features both of descriptive assertions and of commands, but are different from both. Prescriptives have universal inputs as well as both universal and idiosyncratic outputs of different types.

That prescriptives share features both of assertions and commands is traditionally seen as one of the *problems* with rules.³⁷ It is in fact the case that rule-expressions are both (somewhat) assertion-like and command-like, but analyzing rule-expressions as speech acts shows it not to be a problem - descriptions and commands do not exhaust the alternatives. What rule-expressions share with descriptions is that they have universal input. Like a descriptive claim about the world, if anyone is justified in saying (e.g.), “no state may aggress against the sovereignty or territorial integrity of another,” *everyone* can secure that justification. Much of the ‘queerness’ about rules

³⁶ Kukla & Lance, *supra* note 30.

³⁷ J.L. MACKIE, *ETHICS* 40 (Penguin 1977).

dissipates if we stop thinking of them as *describing* odd metaphysical creatures that partake both of fact-ness and value-ness, but rather as moves within language games that have a certain set of properties speakers happen to find congenial.

Things are somewhat dicier with the output side of prescriptives. Again, like descriptives, prescriptives have a universal output. If I issue a prescriptive, I make it possible³⁸ for everyone else to secure entitlement to re-issue³⁹ that prescriptive and defer justification to my tokening of the speech act. This is not mysterious - all it really means is that, if someone challenges you to provide a justification for *your* use of the prescriptive speech act, and you know of *my* use, you can (*ceteris paribus*) defer to my use. Then *I* am responsible for responding to the challenge - if I cannot, your use of the speech act was unjustified (but only epistemically blameworthy if you had good reason not to rely on mine). Deference is an important feature of the normative pragmatics of discourse, since it lets us divide epistemic labor, as it were. Your repetition of my speech act may have further

³⁸ My mere act is not sufficient for everyone else's entitlement - for instance, you may not have heard what I said, and so you couldn't very well appeal to my speech act. The point is that my claim is now *available* to anyone who is in a position to appeal to my speech act, so long as nothing prevents that appeal, and I am now committed to defending your deference.

³⁹ The structure of this inherited entitlement is analogous to what Brandom (*supra* note 29, at 170) discusses as the maker of an assertion's granting of a license for reassertion to others in the discourse. Brandom is concerned with assertions in particular, but the point holds for any speech act to which others can defer for justification in making the same utterance. Since calling the repetition of *any* speech act a *reassertion* would be misleading at best. So I will use the more generic idea of 'reissuance.'

consequences on which you can 'build' - for instance, you may be able to meet challenges to further speech acts by appealing to the one you have repeated, or draw logical inferences. Deference is what lets me make justified assertions about, e.g., physics, without having to spend my days in the lab.

As a last note, it is important to keep in mind that deference, like all speech-act pragmatics, is a normative relationship between *token* speech acts. It would make no sense to talk about it as a relationship between types of speech act, since deference is a matter of passing off the justificatory burden for the *same* (type of) speech act. Deference lets us the discourse work by linking together token speech acts.

We cannot discharge our duties of defending *all* our speech acts by deference (e.g., you can't say, "I see the cat!" and, when challenged say, "well, *Daniel* said *he* saw it") - but many types of speech act, including both (third-person) descriptive statements and prescriptives allow for deference. In general, any type of speech-act with a universal input will allow for deferences as one of its outputs. This is because, since speech acts with universal inputs are the sort of act that everyone (or no one) can secure entitlement to, a competent user of one will simultaneously commit herself to the permissibility of anyone else re-using the speech act. This double

commitment will be an important feature of how the normative status of prescriptives can change in CIL.

Deference is a powerful normative 'move' to make in a discourse, and so the universal reissuance 'license' that every prescriptive speech act grants is important. Still, if all that my saying (with justification), "no nation may aggress against the political independence or territorial integrity of another," did was let *you* say it, or even draw logical inferences from it, the law would be much less interesting. One thing that articulating a rule-expression is supposed to do is *change* behavior. Of course, keeping with our normative pragmatic analysis, we are not primarily concerned with the ability of language to *cause* behavior to change; but one major reason we are interested in the ability to make pronouncements of law is that they are supposed to have a normative impact on non-speech acts. That is, saying, "no state may aggress against another," can function as a *challenge* to the legality of your invasion. It is possible to use a prescriptive without any particular act in view. But this sort of 'theoretical' manipulation of prescriptives would be difficult to understand if we did not understand that prescriptives are paradigmatically directed at guiding action. Non-action-oriented uses of prescriptives are derivative upon their (at least possible) use to influence the normative status of acts.

This action-oriented output of prescriptives is idiosyncratic. By saying, “no state may aggress against another,” I *license* my hearers to use it as a challenge to any⁴⁰ act of aggression. But it may also have an influence on non-speech acts, and when it does, that influence will paradigmatically be directed at a *particular* act. Prescriptives can be used as justifications and explanations, but justifications are always *of* some act. When I use the prescriptive, it operates pragmatically as a challenge or justification within a concrete ongoing dispute.

There is a sense in which we want to say that your invasion is illegal even if no one says anything - but in terms of *pragmatics* of language use, this more or less amounts to saying that someone *could* have challenged you even if no one did. From the standpoint of an analysis of how language progresses as a social phenomenon, this is very much like saying that you *could* have made a different move that would not have landed you in checkmate. This is important in some aspect, but in terms of who wins the game what’s relevant is that you *didn’t* make the move. Similarly with international law - an

⁴⁰ It is important to keep different universal elements straight. Not all prescriptives are semantically universal - for instance, “Iraq’s 1991 invasion of Kuwait was illegal,” is a prescriptive and can be re-issued (if it’s OK for me to say it, it’s OK for you to say it, too) under a universal reissuance license. But because it is not *semantically* universal, any issuance of it will have an effect only on that particular invasion. “No state may aggress against another,” is semantically universal - not only can anyone use it if anyone can (because of the universal reissuance license for prescriptives), anyone can use it to challenge the justification of *any* act of aggression (because it is semantically universal). My point is that semantic universality does not necessarily imply pragmatic universality. Even semantically universal prescriptives are *used* in particular disputes to justify or challenge *particular* acts.

unchallenged invasion goes through with just as little legal opposition or adverse legal consequence as one to which no challenge was possible. Of course, someone might later look back and say, "look, that invasion was really wildly illegal, even though no one said so at the time." But this should be regarded as a *new* challenge (that may succeed or fail, have its own normative impact, etc.), not merely the uncovering of some 'latent' challenge that had been there all along. We should not be tempted to think of this as making the act legal just because it wasn't challenged - what I am discussing here is the pragmatic structure of disputes over legality, not a metaphysical status. What *is* the case is that if an act is never successfully challenged (in a sense I will explain in the next section), it would never be *justified* for anyone to *treat* it as illegal - in which case we could only talk about its 'really' being illegal by taking up a standpoint outside the discourse. From the standpoint of the pragmatics, we should simply resist the temptation to *assume* that there must be something determinate to legal status outside of what can be justifiably asserted within legal discourse. Recall the discussion of legal metaphysics and legal epistemology in chapter one - law is essentially about human conduct and conflict, so any 'real' legality that transcended the discourse would not be all that helpful. There may be a pragmatics-transcendent notion of legality that attaches even in the

absence of challenges, but thinking that it tells us anything interesting about legal discourse would be a mistake.

In terms of their impact on non-speech acts, prescriptives are idiosyncratic - each prescriptive speech act is directed at affecting the normative status (most typically, demanding or providing a justification) of some particular act. The paradigmatic practical role of a law-expression is to challenge or justify an act, to operate within a dispute - we care about laws because they can permit or prohibit certain courses of action. Because we are concerned about the way actual practice progresses, it would be misleading to say that any *token* law-expression challenges *all* acts of a particular kind - what it does is challenge *this* act, and also open the door to future challenges of other acts to be justified via deference. Of course, it is possible to use a law-expression in a way that is not tied to a dispute over any particular act - even state actors sometimes simply express their views about which law-expressions are in general justified (though this phenomenon is less important to legal discourse than sometimes seems to be assumed by theorists). Successful use in such situations (which are themselves concrete uses, and subject to dispute) will warrant reissuance, and so is not pragmatically idle. But the full practical import of those expressions needs to be understood in terms of what kinds of normative effect such expressions

will have when used as challenges and justifications – and, as I will discuss under the heading of “messiness” below, we should not assume that all those normative effects are somehow determinate even when a law-expression is used outside of an immediate dispute.

Universal input and a combination of universal and idiosyncratic outputs are general features of all prescriptives. But in analyzing expressions of *opinio* we are concerned only with a special subset of prescriptives/rule-expressions, a subset I will refer to as specifically *law*-expressions. There are speech acts with the character of prescriptives at all levels of generality. For instance, “one ought to act in accord with justice,” is a prescriptive, and so is, “Britain must remove its ships from the Corfu Channel immediately.” Neither sort of statement is what we think of, intuitively, when we talk about laws – the first is too general and the second too specific.

The logic of legal discourse demands that claims of legal ought which refer to specific actors and circumstances be justified by appeal to more general rules of law. If everyone agrees on the normative status of some particular act, there is simply no challenge made. If, on the other hand, a challenge *is* made, we do not let the actor get away with merely referring to other specific acts that were judged legal. Even in cases that rely heavily on legal precedent (and even in domestic systems that have an explicit doctrine of *stare decisis*), legal discourse requires that some more general principle be

articulated that is supposed to *say* what the similarity between the cited cases is. Simply saying, “well, it seems a lot like cases A, B, and C, but I can’t put my finger on *why*,” does not cut it.⁴¹ So there is a sense in which claims like the second above never represent the basic normative structure of the law - their warrant is always derivative. But at the same time, legal discourse does not demand agreement on very broad principles of legal ought (especially those which shade into claims of morality or policy); in fact, this may be seen as a prime advantage of legal discourse with respect to moral or political discourse.

It is difficult to describe exactly where expressions of *laws* drift into expressions of principle or directives for particular circumstances. Fortunately, for our current purposes we do not need to - especially, little in my account turns on where we draw the line between what Dworkin called “rules” and more general moral/political “principles.”⁴² More important is the distinction between rules of law and specific directives. Because legal discourse requires specific directives to be justified in terms of general rules, what we are really concerned with when we ask about how CIL can change is how there can be changes in the warrant of prescriptives that are at least in principle applicable to a number of different cases (and, therefore, which do

⁴¹ There may be very good reasons *why* legal discourse operates this way. But for now I am confident enough that people will agree that we *do* treat legal claims this way to leave it as an unanalyzed feature of legal discourse.

⁴² RONALD DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14, 24 (Harvard UP 1978).

not make essential reference to particular acts or actors). It would be somewhat odd to ask how the warrant for particular directives could change over time, simply because the answer is so obvious - specific directives are only applicable to specific situations, and which situations we are dealing with changes over time. When we are concerned with 'the law,' we are concerned with prescriptives that can be re-applied.

To sum up, using the Kukla/Lance taxonomy lets us get a more specific grip on the role that law-expressions play in the practice of international legal discourse. Rule-expressions have two kinds of output. First, issuing a law-expression (with justification) licenses other participants in the discourse to repeat that law-expression and defer justification. Second, issuing a law-expression paradigmatically has the further normative effect of challenging or redeeming entitlement to some particular non-speech act. Lastly, law-expressions (unlike prescriptives in general) are at least in principle applicable to an indefinite number of cases. In the next few sections, I will show how these properties combine with some features of practices in general to allow for CIL change.

Being Normative

Before we can really say with any precision *how* CIL changes, we need to get a better grip on what it would mean for the use of some law-expression

to be justified (what's justified can't change unless some law-expressions can be justified). I've said that we need to accept as a brute fact that we are able to judge (some of) each others' acts as justified (or not) on a case-by-case basis, and without articulating any further explicit rules. But this leaves open the question of *what* we are doing when we regard some act as justified. Especially given my focus on the pragmatics of language-use, it would be unacceptable for me to say that we just have an unanalyzable attitude (especially one with no further practical upshot!) of regarding-as-justified.

The normative attitude of regarding something as justified has several elements. What I am after is a notion of a normative *practice*, and so what I need, first and foremost, is a way of making sense of such a practice and differentiating it from mere behavior. This is *not* the same thing as grounding normativity in general - even agents who (*ex hypothesi*) are capable of making normative judgments will regard some of their behavior as normatively-laden and the rest as not guided by norms. What I need to discuss is the differences, even to normative agents, between those two sorts of behavior - in other words, what difference it makes to agents that they regard some behaviors as subject to normative assessment. In order to make sense of a practice of regarding some acts as justified and others as unjustified, *some* degree of convergence in behavior among participants is

necessary. A completely chaotic set of behavior would not be able to be regarded as a practice *at all*, and any area of a practice where behavior is chaotic would probably not be best regarded as governed by a law.

There are two important caveats to this convergence requirement. The first is that the convergence need not be around any regularity that would be identifiable by a non-participant. I do not see any reason why, for instance, we need to be able to translate our understanding of what it is for an act to be legal into terms that could be grasped by someone who approached state behavior using only the vocabulary of basic physics. I am not arguing that we could *not* carry out such a reduction, either - I merely want to distance myself from the positive claim that all practices must contain regularities assessable from the outside. My claim is just that, at least, for there to be a law about something, *participants* in the practice for which it is supposed to be a law must recognize some degree of convergence in behavior.

The second important caveat is that the necessary convergence need not be a matter of agreement on the propriety of first-order acts. There are two elements involved in judging whether or not something is justified. First, there is the question of whether the act in question is the sort of thing subject to normative assessment *at all*, and only then whether or not it is

justified. The first question is the one on which it is more important that there be general convergence in the practice.

If, in order to regard some act as subject to normative assessment *at all*, participants in the practice needed to converge on when it was justified, nothing over which there was any dispute could be justified or unjustified. This (*pace* some of my undergraduate students) would be silly - it would make a muck of our whole use of normative assessment, which is to talk about who is right and who is wrong when disputes *do* arise.

For both my theoretical (and many practical) purposes, the question of whether some act *is* justified is less important than the question of whether it is appropriately subject to normative assessment at all. In particular, the real problem for CIL is not whether this or that act is a valid norm of CIL - perhaps surprisingly, there is often broad consensus on particular norms, despite the widespread worries about the coherence of CIL (as, for instance, we saw earlier in the case of the torture norm). Rather, the problem is more a matter of how in the world rules could get the sort of normative status CIL seems to attach to them at all - whether they end up being considered legal, illegal, or indifferent - and how we are to even begin thinking about how to adjudicate disputes that do arise.

Since CIL-discourse is a practice, and rules of CIL the sorts of things that are invoked in an attempt to regulate state acts that might otherwise

bring nations into conflict, I will focus on the pragmatic character of regarding a conflict as a normative *dispute* rather than a non-normative *fight*. What distinguishes a dispute from a fight is obviously not convergence on the first-order propriety of an act. What participants in a dispute agree on is that the subject of their dispute is something about which one of them can be right and the other wrong - it has an objective normative status.⁴³ And one of Brandom's insights is that the *practical point* of talking about objectivity (i.e., whether or not some act is *really* justified, as opposed to just let pass or *really* unjustified as opposed to just shouted down) has more to do with structuring disputes than resolving them. That is, we are practically concerned with objectivity because our ability to have fruitful disputes (as opposed to mere fights) in part depends on there being, from each disputant's perspective, a potential difference between what she believes and what is true - and, hence, at least in principle the possibility of the other disputant making a successful challenge. Objectivity, in Brandom's schema, is a *structural* property of discursive conflict that has to do with the permanent possibility of *mistake*: Brandom's preferred account is to understand objectivity as

⁴³ This convergence need not be explicit. However, in cases where this assumption is explicitly rejected - where we say something along the lines of, "I guess it's just to each his own," - we give up on regarding the fight as a dispute in which we can give reasons to compel the other's assent, etc.

...consisting in a kind of perspectival *form* rather than in a non-perspectival or cross-perspectival *content*. What is shared by all discursive perspectives is *that* there is a difference between what is objectively correct... and what is merely taken to be so, not *what* it is - the structure, not the content."⁴⁴

Brandom works out this idea in great detail based on his inferentialist analysis of language (and my account draws heavily on his, though it is filtered through my own concerns). But the basic point is rather simple and, I think, portable to any discussion of normativity in terms of pragmatics. The difference between a dispute and a fight is that if you regard yourself as in a *dispute* with someone you take your interlocutor to be *mistaken* and hence subject to *challenge*. There's no point in asking a shark to defend its choice to eat you. But if I am in a normative dispute with someone, I can attempt to challenge their act - and then they must produce a justification to meet my challenge, on pain of being stripped of their own justification. What makes a dispute a dispute is that participants recognize that they are subject to challenges to which they (normatively) must respond, and that there is no way to rule all possible challenges out of bounds (i.e., it is always possible that you are mistaken in your claim). There is no real way to challenge my entitlement to a claim like, "I like chocolate ice cream better than vanilla." You can challenge my sincerity, but beyond that *de gustibus non disputandum est*. By contrast, I cannot regard the mere fact that I have made some speech

⁴⁴ BRANDOM, *supra* note 29, at 600.

act as enough to make it justified and yet still regard that act as subject to normative assessment.

Now, there must be some brute convergence here. It is when we reach some point where we 'agree to disagree,' or otherwise simply refuse to recognize the other's challenge or response, that the dispute starts looking like mere fighting. A dispute is a series of speech acts starting with the disputed act and then moving through a challenge-response-challenge pattern. At every point in the series, a disputant must do one of two things. Either he must acknowledge the justification of his interlocutor's act, or he must respond to it. Challenges and responses are not some mysterious species, they are just more speech acts that are normatively related to other speech acts in the dispute in the right way. As acts, they are themselves open to challenge, and so there are always two options for a disputant who does not want to acquiesce - respond to her interlocutor's challenge (response), or challenge the justification of that challenge (response). Then the other must either acquiesce or respond (challenge). There need not be convergence on the propriety of any particular act so long as there is convergence on the propriety of how to challenge (respond to) that act's propriety (and this option 'chains' - divergence on the propriety of a challenge can be replaced with convergence on the propriety of a challenge to that challenge). So long as the disputants do not give up on finding some

level on which they agree about how to carry out their dispute, we can make sense of it being a dispute about right and wrong.

The reader can be excused for having two queasy feelings in the pit of her stomach. First, this process could in principle go on indefinitely. Given the constant possibility of challenging challenges, a dispute could ramify forever without ever definitively reaching a point at which it is clear that the disputants agree or disagree. But we are not concerned with what is possible in principle - we're concerned with how the *pragmatics* of discourse work, and few disputes *actually* go on forever. At some point most disputes reach convergence (at least on how to dispute, what counts as a good challenge, etc.), or the disputants give up and work around each other or try to bomb each other into submission. The rare sorts of disputes that can go on indefinitely, such as aesthetic debates, are precisely the kind of situation in which the disputants seem to value their argument for its own sake, and so we should not worry that this model gets them wrong - we should *expect* such disputes, if they are well-designed, to be able to go on indefinitely.

Secondly, and perhaps more importantly, where did *resolution* go? How can we say that this picture of (potentially) endless dispute bounded only by contingent convergence is a picture of *real* normativity - there's no answer! My first response is to counsel calm: there may in fact be rationally

obligatory resolutions to all disputes. Remember, we are concerned with the pragmatics of how discourses work - what counts as a good response will surely be guided by participants' ideas of meaning and such; I'm just not answering those questions here, even for the limited case of law.

My second response is to point out that, from the side of pragmatic analysis, my account's lack of commitment to resolution is a theoretical virtue. We would be making a huge mistake if we thought normativity could somehow *compel* disputants to agree - the logical "must" just isn't that hard. If we are not worried about compelling convergence, then we are left with figuring out how to manage our disputes so that we remain open to fruitful influence by other disputants - we take seriously their claims upon us and expect them to take seriously our claims upon them. This is what is accomplished by a commitment to the possibility of mistake, even without convergence on what the right answer is. So long as I accept the possibility of challenges to my act (i.e., I am willing to engage with any challenge as something to be acquiesced in, challenged in turn, or responded to), I am maintaining a practical distinction between what *I* say and what's right. And that is all we need to make sense of how disputes *operate*. Commitment to the dispute is pragmatically more important than access to a resolution.

Furthermore, as I have suggested, understanding how disputes work, rather than how they are resolved, is the more important theoretical task for

a theory of CIL. In the first place, note that international disputes are rarely directly over the abstract content of CIL. What states dispute about is whether this or that act was legal, and whether it justifies sanction or reprisal. They rarely sit about of an afternoon and discuss CIL for its own sake (even things like UN discussions tend to be undertaken with some concrete case in mind). When disputes about the content of CIL arise, they are generally the result of a state using a law-expression as a challenge (response) in a practical dispute. So, in understanding the pragmatics of CIL-discourse by states, it is more important that we understand the way that invocations of CIL impact on disputes than that we understand how meta-disputes about the propriety of those invocations might be settled once and for all.

So much for how to tell when some act is subjected to normative assessment at all. How do we know when it is regarded as passing? Again, we're only concerned with the practical upshot of being treated as right - I'm not taking a position on what being right *really* consists in (even though ideas about that will underlay any judgment that one is right), just what the content of treating someone as right is, from a practical standpoint. This is not an idle question, since the pragmatics cannot simply be a matter of having a special twinge about someone's act. There must be an upshot to treating someone as right rather than wrong.

Given that we treat someone's act as subject to normative assessment at all (in the way described above) there are several marks that we have taken their act to be justified. First, acquiescence in a dispute is a sign of acceptance, though this may also indicate *mere* acquiescence. What makes the difference is whether or not one is willing to accept the act's consequences for further acts, especially beyond the dispute at hand. In the particular case of law-expressions, treating the expression as justified will involve accepting its re-issuance in other circumstances, and its use to justify specific directives. At the very least, if one does not accept its use to justify some specific directive or its normative import for some further act, one must dispute the connection between the directive (or act) and the law-expression rather than attacking the law-expression's justification itself (remember that, because of universal input, a law-expression justified anywhere is justified everywhere, so we cannot pick and choose when something will count as a law). Lastly, taking a law-expression (or any other speech act that permits deference) to be justified means accepting deferences to that act - you can challenge the propriety of the deference, but if the deference is good, you must accept the deferrer's act if you accept the propriety of the deferred-to act. In short, treating an act as justified means treating it as having the full normative impact (especially in terms of output proprieties) it claims to have on other speech acts.

An upshot of this account is that whether or not an act is treated as justified even by a particular participant may be indeterminate from a practical point of view. Until and unless we come into conflict, there is simply not much to be said about whether or not we disagree. We can speak counterfactually about how the practice *would* go *were* we to come into conflict - but situations of conflict are where the pragmatics of normativity come into play. Trying to think through the practical import of treating each other as right or wrong without making at least hypothetical reference to a concrete conflict is simply misguided, on this account. And aside from how appeals to a speech act will be treated in future conflict situations (perhaps hypothetical ones) there is simply nothing to say about whether or not I have *treated* some speech act as right or merely given up and acquiesced. Even if I treat some act inconsistently (e.g., I use it as a challenge myself, but do not accept reissuances), the most that can be said from a *pragmatic* standpoint is that my inconsistency will generally invite challenges. The basic point is that the *pragmatics* of rightness and wrongness are tools of analysis for conflict situations, and we should not expect them to get us far beyond that analysis. To say that someone treats an act (type) as normative is something of an idealization of the way that she reacts to uses of its token in particular situations.

Messiness

And the noise is too much
And the seeds that are sown
Are no longer your own
- Joy Division, "Leaders of Men"

The indeterminacy that contingency lets creep into CIL discourse is important to how it can change, but CIL change has as much to do with interpersonal indeterminacy as with the intrapersonal sort. Just as there may be indeterminacy in the practical attitude any particular agent takes towards some type of speech act, there will often be no *general* answer to the question, "is this law-expression justified in the practice as a whole?" In terms of pragmatics, the answer will at least be conditioned on further questions like, "by whose lights?" It can certainly make sense to talk about a norm-laden practice or discourse without participants converging on their assessments of *all* a speech-act (types) - again, managing such divergence is part of the point of having such practices. Whether and how a dispute can be resolved is (in Brandom's words) a "messy retail business" of navigating the particular norms of practice.⁴⁵ It's as impossible to give a *general* account of whether some speech act will resolve disputes as it is to give a general account of whether some move will win chess games. What we are concerned

⁴⁵ *Id.* at 601.

with is understanding how any law-expression could *get* to be treated as having a normative status (or change what that status is), which only requires some level of convergence (or at least, lack of fruitless divergence) on how to conduct disputes over proprieties.

A practice can survive high levels of unresolved dispute, and even higher levels of disputes that have been resolved in a way that is ambiguous between agreement and mere *modus vivendi*. The end result is that many (if not all) practices will be deeply 'messy' - there may be many questions about the practical normative status of various speech acts (including law-expressions) that do not have general and determinate answers. Instead, we may be left talking about law-expressions being 'more or less' acceptable in the practice, more or less likely to be treated as appropriate by various agents in various situations.

There are two sorts of messiness that a practice, even one where each actual speech-act can be meaningfully treated as right or wrong, can have. There may not be convergence on whether or not individual (token) speech-acts are or would be treated as justified or unjustified (i.e., given their practical effect) by participants. And, there may not be convergence on *what* the practical upshot of some speech-act is (to what further acts it entitles its user, to what challenges it will be treated as an acceptable response, etc.). Both of these kinds of divergence will generate disputes (not fights), but aside

from talking about how those disputes go (or are likely to go - talking about how they *should* go is engaging in another dispute, not merely describing one at hand), there is nothing to be said about what normative status 'the practice' gives to some speech act. Combined with the possibility that there may be no determinate answer to the question of how even a particular participant treats some (type) speech act, the viability of questions like "what's the normative status of this kind of speech act?" fades in comparison to that of questions like "will issuing this law-expression here successfully meet the challenge made?" Note that this second question is *not* non-normative! In a practice where participants can understand and respond to each others' normative judgments, 'successfully' resolving a dispute will involve making (normatively) acceptable challenges and responses. Of course, disputes like this may devolve into fights, but that does not mean that there is not a way of carrying on the dispute in a normative way.

Also, remember that in terms of our pragmatic analysis, we are more concerned with whether we can *make the claim* that we ought to do something (and how that claim will be treated), and how we could defend it, than with any transcendent sense of 'ought.' Claiming that we ought to treat some speech act thus-and-so, if we divorce that claim from how disputes about the speech act should be treated, is idle from the standpoint of analyzing pragmatics. So there is no answer to the question, "yes, but how

ought it be treated?" that is both guaranteed to be entirely determinate and makes any practical difference to the discourse. If you want to make a practical difference, you can *say* something like, "you ought to respect the norm of non-aggression," - but this is a challenging move within the discourse, not a transcendent description.

How do practices survive messiness without *always* devolving into fights? In one sense, the reasons are as many and varied as there are practices that we find it congenial to engage in. A participant in a practice who decides, like Thrasymachus, to simply leave the conversation entirely does not win the dispute - even though she may win the fight. Participating in discourses offers various benefits from the perspective of the participants. Football players don't cheat every time they can because playing the game, by its rules, is something that they value. Similarly, states derive (or see themselves as deriving) long-term benefits from being participants in good standing in legal discourse, even if they must sometimes accept short-term disadvantages. In the broader sense, practices survive messiness because participants are committed to their survival - the practice itself cannot *compel* such commitment, and so from a perspective internal to the practice the commitment is something of an unexplained explainer. Not being committed to the practice may be a choice criticizable from inside the practice, but there is no supra-practical way of disputing it except from

within *another* practice that allows for such discussions (as, for instance, we might criticize a nation that fails to respect international law from within *moral* discourse). Ultimately, commitment to finding a way to move forward on disputes without lapsing into fighting is what keeps practices together despite their messiness, not any deep feature of practices that demands continuance in a metaphysical way.

Actually, we should not be surprised that the pragmatics of law-expressions admit of a lot of indeterminacy when we try to ask after the 'real,' supra-pragmatic status of speech acts. The questions are just misguided, when asked of an account of the pragmatics of discourse (rather than of its meaning). Nonetheless, the practical messiness of CIL discourse will be important in understanding CIL change.

The phenomenon of messiness also helps explain why practice is as important an element of CIL 'formation' as *opinio*. It has seemed to some theorists, such as Koskeniemi, that it would "involve inadmissible formalism or utopianism to deny the status of law from a norm which all States consider as valid[.]"⁴⁶ But this mistakes the relationship between words (at least the words of CIL discourse) and acts for a descriptive one. CIL needs practice not as a superfluous formal element, but because law-expressions only are what they are as part of an ongoing practice. Granted, true consensus will often

⁴⁶ KOSKENIEMI, *supra* ch. 1 note 23, at 361.

lead very *quickly* to the normative acceptance of some law-expression into the discourse. But simple consensus that some law-expression would be a good one to use, divorced from giving it practical deployment in claim-conflict situations, is mere sound and fury.

Messiness and Generality

If you stand to reason
You're in the game
The rules may be elusive
But our pieces are the same
- *Bad Religion, "Kyoto Now"*

It may be appropriate to step back for a moment at this point and reassess the paradox. I have claimed that the pragmatics of law-expressions are marked by four important properties: reapplicability (moderate generality), grounding of reissuance licenses and supporting justification via deference, and idiosyncratic effect on non-speech acts. I've further claimed that most practices, with CIL discourse being a prime example, are characterized by messiness - their normativity is 'held together' not by a high degree of agreement on first-order acts in the practice, but rather by a meta-level of commitment to finding ways of continuing disputes rather than resorting to brute force. In terms of all this analysis, we can think of the paradox in a

somewhat different way than, “how can a law of CIL pre-exist itself?” In terms of the pragmatics of CIL discourse, the problem looks more like, “how can the law-expressions which are justified in the discourse change, despite the fact that justification seems to require reference to previous justified use?” My argument will be that the messiness of CIL discourse and the moderate generality of law-expressions allow participants to use the interaction between law-expressions’ universal and idiosyncratic outputs to change the warrant of law-expressions.

The paradox as re-stated is less pithy and still not an easy question to answer. How law-expressions (or prescriptives more broadly) get and change warrant is a matter idiosyncratic to each practice that contains them, but there are two popular answers. One is that all law-expressions are inferred from a privileged set of foundational speech acts - all justification for law-expressions can ultimately be pushed to some member of that set, and once the actor is able to produce one of the privileged speech acts as a response to a challenge, the dispute is over. There are two problems with this for CIL, though. First, it is not at all clear that CIL *has* such a privileged set of speech acts.⁴⁷ Worse, even were there such a foundational set, this sort of warrant-

⁴⁷ *Ius cogens* rules might spring to mind, but this is the wrong kind of privilege. Considerations of *ius cogens* trump all other considerations of law. But what we would need out of ‘foundational’ speech acts would be something like complete convergence on their propriety - and few if any putative rules of *jus cogens* are uncontroversial enough to do this job.

generation would not really give us CIL *change*. Though some agent might articulate a law-expression which no one had thought of before, if all normative connections were fixed (and if they were not, we would need some way of explaining how *those* norms changed), the normative status of all possible acts would be fixed in advance by the foundational law-expressions. In particular, it would be impossible for previously-warranted law-expressions to obsolesce. The second popular model for law-expression change is to have authoritative lawmakers who can issue new law-expressions more or less by fiat.⁴⁸ But CIL is notable for lacking such authorities. States can in some sense create new CIL (issue newly warranted law-expressions), but as the mechanism for doing so is laid out in the orthodox test, it is not at all clear (yet! I'm getting to it...) *how* they could do so. So whatever authority states have to create CIL, it will not do the explanatory job we need it to do here; instead, it stands in need of explanation.

The key to understanding how the warrant for law-expressions can change is to combine the moderate generality of law-expressions with the messiness of legal discourse. In a nutshell, moderate generality means that

⁴⁸ Of course, there will typically be law-expressions to which they appeal to justify their actions (as, e.g., in the U.S., members of congress appeal to the constitution for their powers). But within their realm of authority, they can genuinely issue new law-expressions as they see fit.

the same law-expression can be used in different situations; messiness means that participants will not necessarily converge on a single way to use it.

Part of the story about how this works has already been told, but let me summarize it to make clearer where extension is needed. Pragmatic disputes are over the use of token speech *acts*, not over abstract types, so divergence in use or judgments of propriety are not necessarily evidence of confusions. If the disputants regarding the issuance of some law-expression can find some level of convergence on how to carry out their dispute, they are not best understood as having a confused fight over mere homonyms, or some such, because they are committed to the idea that at most one of them is using the token correctly. And the relationship between the use of the law-expression at hand and other uses of the law-expression is a matter of what token deferences the participants are willing to accept. Because we are talking about pragmatics, we do not need something like sameness of meaning to *explain* why the participants are committed to treating the conflict as a reasoned (normative) dispute - in fact, the story is closer to being the other way around. Commitment to carrying out the dispute in a particular way is what gives practical point to calling this speech act an instance of the 'same' act as some other utterance. If there is some reason why the parties should or should not continue to treat the law-expression as something that they have to deal with a conflict over the use of (as opposed to just ignoring each

others' use), or should or should not accept deferences to some other similar token speech act as justificatory moves, a disputant can make a challenge to that effect. Any 'shoulds' that cannot be used as challenging moves may be interesting from a theoretical standpoint, but they are invisible from a pragmatic one.

As I have already discussed, a pragmatic analysis of dispute over the use of some law-expression is always local. We are concerned with the history and progress of some *particular* debate - and what we can say about the broader life of a law-expression is, again from the perspective of the pragmatics, the history of how such debates have been and can be interrelated. All of this said, we can now move on to the issue of how such disputes tend to progress in CIL particularly, and how the features of CIL disputes play into an analysis of CIL change.

Bin Cheng actually makes a nice statement of the messiness and practice-dependence of international legal rules, though he does little with it:

... law is polysemous. A legal rule, instead of being a narrow and straight path, is rather like a highway with many traffic lanes, and one can often travel by [any one] of the lanes. If there is no dispute, a broad spectrum of interpretations can continue to exist for a long time. It is only when there is a dispute that difficulties will arise... The horizontal character of the international legal order... means that genuinely bona fides disputes regarding

the interpretation of a rule of international law can easily arise because of the polysemous nature of the rule...⁴⁹

Cheng is not able to do much with this observation because his theory takes a limited view of such disputes. Because there is no *authority* that can solve them, Cheng takes it that any party's interpretation is, "according to the accepted rules of interpretation, perfectly permissible," and that, failing agreement, "such disputes are in international law simply not soluble." He is probably right on the second count (practice is, after all, messy), but it is a deep mistake to think that entails the first claim, that there are no reasons to be given for one interpretation (or use) over another. Let us turn to a closer examination of such disputes.

Abstractly speaking, there are two typical loci of dispute over any law-expression: whether or not use of the law-expression is warranted, and whether or not it has some particular import for some particular act. What is specific to CIL discourse are the normative constraints it puts on these two kinds of disputes. They are deeply connected, but let me begin with the first.

Justifying the use of the law-expression when challenged is a combination of deference and inference. Since no legal actor in CIL is empowered to issue new law-expressions by pure authority, deference is an important backbone of CIL justification - as enshrined in the backwards-

⁴⁹ Cheng, *supra* ch. 1 note 22, at 521-522.

looking character of the standard *opinio* requirement. The easiest way to claim justification for the use of the law-expression here and now is to appeal to some previous use of it that your interlocutor is unable or unwilling to challenge. Sometimes, of course, the particular law-expression you are trying to use has never been used before (or has not been used in a way that your interlocutor is unwilling or unable to challenge), in which case you may infer it from other speech acts, by whatever semantic rules the discourse allows (in the case of CIL discourse, these semantic rules are generally imported from the natural language in which the discourse is conducted, perhaps with the addition of a few terms of art, such as "*ius cogens*"). Every speech act is granted some connections to other speech acts by the linguistic practice - this is nothing more mysterious than our acceptance of moves from claims like "no state may impair the political independence of another," to "no state may occupy another's territory without the occupied state's consent."

Things get more interesting when we start thinking about disputes over the application to *particular* cases. Law-expressions do not operate in a vacuum; legal discourse has its own internal logic connecting one expression to another in a fairly dense web, and it is itself connected up with natural language. So it is generally not an option for a state to simply deny any normative import it finds inconvenient. A state that insisted (without a fancy explanation) that a ban on impairing another's political independence only

barred occupation if the occupiers wore red would very quickly find itself out of legal discourse entirely. There is, quite literally, very little that would be worth saying to such a state - but that just expresses the boundaries of language's *perlocutionary* force, its power to compel behavior. Given enough convergence at least on ways to dispute, states that accept the use of some law-expression will often have to accept unwelcome normative imports for their actions.

When we get past the point of one disputant simply removing itself from the conversation, the structure is more complex, and the issue of deference comes back. A major constraint on what normative import any law-expression can be taken to have will be the sorts of normative import it has been taken to have in the past. Any participant in a discourse will be caught up in a whole network of relationships of similarity - judgments about which actions should be treated alike - many of which would be very costly (in terms of the reasons available to it on future occasions) to overthrow. A participant who is unwilling to recognize any similarity relationships will perhaps get herself out of some particular damaging consequence, but will leave herself with few discursive moves to make on future occasions. The more uses of the law-expression that all parties to a dispute converge on their assessments of, the more difficult it will be for any party to diverge in a future case, since his interlocutors will be able to defer to the agreed-upon

uses as a challenge to any divergence. And an actor that has (or claims to have) commitments on similarity between acts that diverge wildly from the consensus views will quickly find himself unable to engage in the discourse and so unable to make normative claims on others in other circumstances. The moderate generality of law-expressions plays an important role here, too. What it *means* to be general, in the pragmatic sense, is for the law-expression to apply to a number of different situations that the users of the law-expression understand to be 'similar,' with the relevant dimension(s) of similarity given by the accepted usage of general expressions within the law-expression. For instance, the scope of application of the torture norm is partially fixed by what participants in legal discourse regard as torture - both as a legal term of art and in discourse more generally when the boundaries of the legal term are unclear. It is not open to any disputant to simply deny reapplicability - that would evidence a misunderstanding of a basic point about how the law is supposed to *work*. Any agent who denies some particular similarity relationship can often be challenged to provide a replacement (e.g., "if not all armed interventions are aggression, what *are* the marks of aggression?"), since simply denying all proposed normative relationships between the law-expression and sorts of acts is not a viable option. No one participant can set the ground rules for a dispute by fiat - all participants are beholden to a commitment to maintaining the practice of

legal discourse (on pain of not being participants any more), which limits how perverse they can be.

Of course, sometimes a new similarity *will* be articulated, and this will sometimes be treated as a reasonable response (and will then change the ways in which the expression can be used in the future). This is one worry that has arisen, for instance, over recent U.S. Department of Justice memos that seem to advocate narrowing the definition of "torture."⁵⁰ There may be many states more than happy to accept new principles governing the acceptable use of the word "torture" - which would leave many acts outside the ambit of the prohibition without touching the justification of the torture-norm-expression itself (which few states would want to publicly undermine).

The constraints that general commitments to normative relations of similarity impose bring us back to challenging some previous use. Since the pragmatics of dispute is about how *actual* disputes progress, they never foreclose the possibility of backwards-looking challenges. Disputes *end* when disputants are able to practically live with the way things stand, which may be when some final meaning has been agreed upon, but need not be. It is always open to future speakers to try to challenge an old speech act's propriety.

⁵⁰ See ch. 3, n.15.

However, it may not be attractive to do so. Because of the universal reissuance license for law-expressions, challenging the propriety of *one* token of a law expression means challenging the propriety of *all* tokenings of it (otherwise, defenders of the token in dispute could simply defer to some other tokening of it). And there are many law-expressions such that, even when states are not happy with what they mean *here*, they will be unwilling to try to remove them entirely from the discourse. The only other option would be to deny that some use is *really* a tokening of the *same* law-expression (e.g., claiming that they are mere homonyms) - but most discourses (CIL included) give a strong *prima facie* weight to homonymy (the structure of token-deference enforces this), so it will be incumbent on the challenging state to undertake the difficult task of differentiating between two uses of what are apparently the same speech act.

So the back-and-forth of CIL dispute exploits the universal and idiosyncratic outputs of law-expressions. Faced with a challenge to an act in the form of some use of a law-expression, a state will attempt to respond to or undermine that challenge. But the respondent is hemmed in by its commitment to the repeatability of law-expressions, and to the normative implications it is willing to accept for similar expressions in similar situations.

Leveraging the Tension

The messiness involved in all this back and forth of dispute is not all bad, however. It also lets us see our way out of the paradox. Because practice is messy, both the practical status and import of some law-expressions may be indeterminate. That indeterminacy does not however prevent a law-expression from being used, and potentially appealed in future uses. Participants can exploit this by making controversial, but plausible, use of already-accepted law-expressions. The paradox is avoided (as we shall see) because a law-expression's warrant does not necessarily imply that controversies over its import cannot arise, or that those controversies must undermine that warrant.

Even disputes about law-expressions that are not directly tied to particular state acts are concrete and particular - if you challenge my claim that military intervention is always and everywhere aggression, you are mounting an attack on my *particular* claim, and if I successfully defeat all challenges, I may have created a universal reissuance license that gives my claim some generality of use, but I have done so through allowing deference to *this token* law-expression. As discussed above,⁵¹ we should not confuse

⁵¹ See n.40.

semantic generality with practical abstraction. We can have disputes over relatively abstract law-expressions, and we can have disputes about rules abstracted from any particular application of the rule, but we never have disputes in the abstract. This lets a high degree of contingency in to the discursive life of those *expressions*, since it is success in a dispute that allows us (barring a new, successful backwards-looking challenge) to defer justification to some law-expression, and disputes are not always resolved in a way that would satisfy a complete systematizer of the law (in fact, they rarely are). In the first place, disputes are not always resolved in a way that prevents them from being opened again in the future. Not all challenges that could be made are in fact made at the time, and (as discussed below) new kinds of challenges may arise. A new challenge can be applied to an old dispute without any mystery - no one is talking about going back in time. To say that an old dispute should not have been resolved the way it was is a challenge *now*, not then, and has its own normative structure (which is largely a matter idiosyncratic to the situation under which the old resolution is being challenged - often because a participant in a new dispute is attempting to defer to a law-expression used in an old one).

In the second place, and more interesting for the paradox, resolving a dispute does not always mean that all the participants have completely thought through the normative implications of the law-expression that they

have let stand (or not). It is entirely possible to let stand some law-expression without even thinking about, let alone resolving, what its normative import will be for every possible act to which it might be relevant, or every possible other speech act that might be connected to it. And we should not be tempted, at least not from the viewpoint of pragmatics, by the thought that every speech act *must* have some determinate set of implications, even if no one has thought of them or is committed to them. Except as they might function in later challenges, such 'latent' normative connections would be pragmatically idle; they certainly make no difference to the participants in the dispute at hand until and unless they are raised as challenges. Nonetheless, deference relations mean that future users of the law-expression can claim justification by pointing to previous uses, even if their aims are things that the earlier users would not and could not have anticipated. Deference relations connect token speech acts with each other, they do not appeal *directly* to the meaning of those acts. Ideally, of course, states and individuals will consider the possible consequences of their words before endorsing some speech act. But we should recognize that for precisely what it is - an idealization. In terms of the pragmatics, what's said is said, and has normative effect until someone makes a challenge that participants in the practice generally endorse. Messy practices often allow for law-expressions to go out into the discursive world half-baked, because full

agreement is neither easy to come by nor necessary to smooth over most practical conflicts.

The tension between the idiosyncratic circumstances under which states decide whether or not to accept the normative implications of rule-expressions and the universal reissuance license that that acceptance grants is what ultimately drives change in CIL. In this interplay we can see how, while there is never a point at which someone can directly point to unequivocally *new* normativity (which would be ruled out by the backwards-looking character of the discourse that the orthodox test strives for in the *opinio* requirement, and that the lack of those with authority to make new laws seems to entail), we can get 'newish' normativity that is robust enough to ground gradual - but always normatively governed - change. How this happens is not nearly as mysterious as it may at first appear.

As time goes on, participants in the practice may change their understandings of the normative import of various law-expressions (in Byers' terms, 'shared understandings' may shift). So, whereas "sovereignty" may have been treated as an absolute at one point in time (serving as a conversation-ender whenever some state proposed to intervene across the borders of another), at a later point - influenced by world events, new fashions in political philosophy, the clout of powerful states, etc. -

participants in the practice may come to treat its normative import differently, accepting new challenges and not accepting old ones. This may even happen through gradual changes in other law-expressions than the one at hand, but which are regarded as normatively related. Nonetheless, barring challenges or changes in the discourse that label the new uses as merely homonyms of the earlier ones, deference to earlier, differently-understood law-expressions will still be possible. From the perspective of discursive pragmatics, what makes a difference is what participants say and let stand, not what they may have anticipated or had in mind. So practice may shift in cases where the warranted law-expressions remain the same, but their implications for acts and specific directives change significantly. Nonetheless, since directives and acts are justified by reference to law-expressions, participants will still be able to claim that they are acting by warrant of an already established law.

One important special case of this is when the new acts that come to be understood as warranted by the (re-understood) old expressions are not non-speech acts, but are uses of other law-expressions. Not only may established law-expressions come to be regarded as justifying (or condemning) non-speech acts that their original issuers may not have anticipated, they may come to be regarded as being proper justificatory moves for new and different law-expressions themselves. So newish law-expressions may come to be treated as justified because they can be inferred

from already-established law-expressions in ways that the original issuers of those established law-expressions would not have anticipated (and may not have endorsed).

Take the example of the establishment clause of the first amendment as it is treated in U.S. constitutional law - despite evidence⁵² that at least some of the founding fathers did not understand it as erecting a full-fledged wall of separation of church and state (and hence, pragmatically, citations of it serving as appropriate challenges to *any* government support for religious institutions), U.S. legal practice generally allows the law-expression to be used in this way, and justified by deference to its use in the Constitution.⁵³ By contrast, the due process clause of the 14th amendment has suffered a degree of bifurcation in its use, with chains of deference divided into uses of "procedural" and "substantive" due process, and many participants in legal discourse rejecting deferential moves from substantive to formal uses (and

⁵² See, for instance, the historical discussion in ch. 1 of ROBERT CORD, *SEPARATION OF CHURCH AND STATE* 3-15 (Lambeth 1982). Cord concludes that, "[t]here appears to be no historical evidence that the First Amendment was intended to preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an *absolute separation or independence* of religion and the national state." (at 15) Of course, a theory like mine implies that Cord's insistence on the original intention behind some law-expression is seriously misguided.

⁵³ Of course, not every participant accepts this - U.S. constitutional discourse is very messy! But claims that, e.g., the founders' intentions should be controlling are best understood, at least as they relate to an understanding of the pragmatics of legal disputes over the constitution, as attempts to *challenge* the dominant current usage. As such, they need to be dealt with on their merits, but are not privileged expressions of the structure of the dispute.

vice versa).⁵⁴ But this 'breaking' of the chain of deference for substantive due process required the explicit articulation of a new norm-expression ("substantive" due process) differentiating the two kinds of uses. So the same basic structure can be seen to be at work - barring a specific new kind of challenge, deferences will tend to be accepted even when the law-expressions come to be used in new ways. All this is just a matter of the deference relations connecting *tokens* through contingent acts of deference - accepted deference relations are not fixed by relationships between types individuated by normative connections (though, of course, when deciding which speech acts to accept, agents may be guided by such more abstract reflections - but those reflections have no pragmatic import unless they are in fact put to use).

An important side note is needed here: the fact that justificatory connections can change (that is, which speech acts are regarded as appropriate responses to which challenges) means that chains of deference and justification are less linear and more opportunistic than it may sometimes seem. It is entirely possible for a previously accepted law-expression to obsolesce without necessarily undermining other law-expressions that, when

⁵⁴ See for example the discussion of the distinction in Part I of John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997).

they were first issued, were justified by appeal to the obsolete speech act. For one thing, no one may be interested in challenging the new speech act, and so it may continue to be given its full pragmatic effect more or less by default - not a problem, since we are concerned with understanding what kinds of reasons can be given in disputes, and no reasons *need* be given when no challenge has been issued. Or, the discursants may come to connect the new law-expression to other expressions than the one it was initially justified on the basis of (this happens explicitly with specific directives as a matter of course in domestic legal systems - it is common to accept a previous judicial *opinion* while rejecting the argumentation, the *dicta*, on which it was based). As a result, over time, as new law-expressions come to be important and their old connections disregarded, that the whole set of accepted law-expressions in a practice may gradually change.

Nonetheless, none of this is the kind of change that would entail the practice 'breaking,' or changing in such a way that its participants would regard it as non-normative. At all steps of these processes, participants are looking for reasons - either they are presenting a speech act that their interlocutors regard as an acceptable response, or they are moving to a different level where they can respond to challenges to their response. Never, except in exceptional cases where the parties give up before they find

a level of dispute on whose proper conduct they can converge, do parties ever reach a point where they are simply fighting or changing the practice by fiat. As a result, we have just what we have needed from the start - change without change, in a way. New normative connections arise, and new patterns of dispute become dominant, but at every step justification (when it is needed) is made by deference to already-accepted law-expressions.

Hartrian Positivism

At this point, my account may sound very similar to Hart's positivism. In particular, my focus on convergence at the level of how to carry out disputes echoes Hart's discussion of the importance of secondary rules governing law-recognition, -change, and -adjudication.⁵⁵ And, my focus on the *actual* acceptance and use of some law-expression in our practice is reminiscent of Hart's doctrine that the ultimate rule of recognition is a social fact not susceptible of *legal* criticism.⁵⁶ This appearance is not entirely accidental - as I mentioned in chapter two, I take myself to be at least in sympathy with traditional positivist accounts of the law. But there are some deep - if subtle - differences between my account and Hart's that are

⁵⁵ HART, *supra* ch. 1 note 12, at 92-93.

⁵⁶ *Id.* at 107.

important to the way I propose to solve the chronological paradox, and I would like to clear them up before I put the icing on my attempted solution.

First, my account does not have Hart's hierarchical structure. All it requires is that participants in a dispute share a normative sense of how to carry on *that* dispute. In general, there need not be convergence on (or even commitment to) a fully systematic set of normative attitudes, or to any *ultimate* rule of recognition in Hart's sense.⁵⁷ The practice can be held together by myriad links between individual disputes, even if they are not all linked by the same rule. However, I do not think this is a key element of Hart's account, so I will leave it aside.

My deeper disagreement with Hart has to do with the *nature and role* of ultimate rules. In the first place, Hart seems to have a very foundationalist picture of their role in justification. Even if we do in fact have no "practical need to go farther" at some stage in a series of legal justifications, the possibility of appealing to some further rule for justification must be there for any legal statement to be valid.⁵⁸ If all Hart means by this is what I mean (that it must be in-principle possible to challenge another's use of a law-expression and that that challenge will often come through the citation of a rule-expression), we have no quarrel. But Hart seems to believe that ultimate

⁵⁷ *Id.* at 105.

⁵⁸ *Id.* at 107.

rules must 'exist' in a more robust sense than that, even before they are taken up as challenges or justifications.

For ultimate rules, Hart runs together the distinction I make between rules in their normative and rules in their descriptive guise. In terms of justification, ultimate rules are ultimate because they are not subject to further challenge, at least further challenge in terms of *legal* reasons. In order to give a sense of the 'existence' of these ultimate rules that does not rely on their justification, Hart appeals to a 'practice theory' of rules - rules are "constituted by a form of social practice comprising both patterns of conduct regularly followed by most members of the group and a distinctive normative attitude to such patterns of conduct... called 'acceptance.'" ⁵⁹ So ultimate rules are binding because of a regularity in the practice.

I have two reasons for rejecting this picture of rules. First, as I indicated above, I think it is a mistake to assume that rules-as-regularities bear any necessary and interesting connection to rules-as-justifications. But more importantly for my current purposes, this view entails that, in a system where there is *not* in fact convergence on a *single* high-level regularity, there can be no warranted uses of legal rule-expressions. From the perspective of the pragmatics of discourse, I see no reason to assume this is true - especially given that, by Hart's own lights, the ultimate rule is rarely if ever articulated,

⁵⁹ *Id.* at 255.

and hence (*pace* Hart) may be regularly followed but is rarely *used*.⁶⁰

Furthermore, the role Hart gives ultimate rules as unjustified justifiers makes them too rigidly *constitutive* of a system of law. The idea Hart seems to have in mind is that adhering to some particular regularity just *is* what it is to follow a particular system of law (U.S. law, German law, international law, etc.). I have been at pains to show that, while there may be agreement on the propriety of the *use* of some high-level law-*expressions* (such as the orthodox test), that need not mean (because of messiness and divergence in assessment of output inferential proprieties) that there is any single, overarching, and interesting convergence in discursive behavior (that is, we may all agree to use the orthodox test while making very different uses of it). And, while we need some level of *local* convergence to carry on any particular dispute, this need not be the result of any single overarching regularity in the practice. More directly, Hart's model would make it impossible for customary law to change, dependent as it is on reference to the *existing* law, which (if it flowed from a single determinate regularity/rule) would itself be rigid and potentially determine all questions.

So, though I share Hart's general commitment to the rules we actually accept and use, my account gives a more flexible picture of what those rules

⁶⁰ *Id.* at 102.

are and how they work, since I am not bound to ground law-expressions in regularities. Let me bring together the threads of this account.

The Virtue of Sloppy Timing

And I said
Does anybody really know what time it is?
I don't
Does anybody really care?
If so I can't imagine why
- *Chicago, "Does Anybody Really Know What Time it Is?"*

Messy practices allow 'newish' law-expressions to gain warrant because the acceptance of a moderately general law-expression can happen - where 'acceptance' means that participants regard it as having its idiosyncratic output of normatively qualifying some particular act as well as its universal one of warranting reissuance - without anyone fully working out *what* the normative connections between that law-expression and various others we may care about are.

One way to understand this is to say that the messiness of practice is matched by the sloppy timing of justification. Justification doesn't happen all at once, and for all. Rather, the challenge and response of justification happens enough around any one use of a law-expression to settle the practical conflict between participants in CIL discourse. And then, the warrant of any law-expression remains open to further challenge that can re-open the initial

justification. If we ask, “when does a law-expression become justified?” there’s no real clear answer – what we *can* do is talk about how and to what extent the law-expression is accepted as a response to challenges.

Yet this sloppiness is precisely what allows for meaningful change in CIL. The result of the provisional and unsystematic nature of justification is that any law-expression can build up quite a bit of practice around itself without needing to have all questions of its justification or normative connections settled. Deference then takes over, letting participants make use of the normative support of law-expressions that are accepted, even if their normative impact is not fully worked out.

In the end, the orthodox statement of the *opinio* test, suitably understood, gives us a fairly good guide to this process.

The *opinio* requirement reflects the need for speech-acts that have the normative significance of challenges and responses. Unless there are some law-expressions of which states can make use to justify their own actions or challenge others’, we could not regard CIL as being a *normative* realm, as required by Postema’s first thesis.

The practice requirement reflects the fact that these law-expressions are best understood in the context of resolving particular practical conflicts that arise in the course of state practice. Without looking at how they are

used to structure particular disputes, discussions of CIL-expressions would be idle and indeterminate. From the pragmatic standpoint that occupies most legal actors - and, so I have argued, should occupy us - to take some law-expression as normative *is* to respond to it in the right way when it is used in a dispute. Since there is (literally) no point to using law-expressions outside the context of disputes, Postema's social thesis, that makes the law a creature of human action, is also fulfilled.

And yet - there is no paradox remaining. The paradox was generated by a picture on which *opinio* needed to reflect something that did not yet exist. The picture of language employed here does not require anything of the sort - as moves within a messy practice, *opinio* can have a significance that is not fully determinate when it is accepted, and which can therefore change without requiring a break with existing practice.

So much for the abstract theory. Much of this may seem abstruse - as it must be at this airily general level of analysis. In the next chapter, I will show how this pragmatic analysis can let us understand some specific cases of CIL change - especially law-expressions using the shifting notions of "sovereignty" and "humanitarian intervention" - without having to regard the change as brutally non-normative.

V: Belgium, Kosovo, “Sovereignty,” and the Interstitial Norm of “Humanitarian Intervention”

In the last chapter, I completed the abstract analysis of pragmatics for law-expressions that illuminates the process of CIL change. In this chapter, I’d like to bring things down to earth a bit, by discussing how, in particular, law-expressions for CIL get caught up in the changing practice, and how the model I have constructed works nicely for understanding a particular instance of CIL change, the growing (but still far from universal) support for a permissive norm of humanitarian intervention.

There are several elements to this discussion. First, I will discuss one particular kind of law-expression that I take to be important to CIL-change in particular, the interstitial law-expression. Then I will discuss a particular case where an interstitial law has been advanced, the case of humanitarian intervention. In that discussion, I will examine how divergence in the usage of related terms like “sovereignty” and “political independence” can be exploited by proponents of an interstitial law, how ambient non-legal discourse helps solidify changes in CIL, and the importance of (often backwards-looking) application of the proposed norm to particular situations and acts in fixing the law-expressions’ idiosyncratic outputs (without which it would be largely empty words).

The Special Restrictions of CIL

Nothing in what I've said up to this point entails that a chronological paradox will arise for *all* practices. It won't. The chronological paradox is not a general feature of practices, it is enforced by a powerful norm (or perhaps better, set of norms) specific to CIL - namely, the orthodox test. When the ICJ statute enjoins us to heed "international custom, as evidence of a general practice accepted as law," it is laying down a specific - and problematic - rule, not describing a general feature of any sane practice. The rule has two problematic aspects. In the first place, it captures the essence of our intuitions about what makes for customary rules rather well, as evidenced by the fact that other formulations (such as that in the U.S. Restatement) do not significantly diverge from it. It seems right to say that new customs arise because we start accepting them in thought and deed. Since it conforms rather nicely to our intuitions, it is difficult to see how the orthodox test could be significantly revised without doing violence to our understanding of what customary law is, and so we are not free to discard it when it becomes inconvenient.¹ In the second place, it seems impossible to

¹ This surely had something to do with the fact that, despite serious debate, the orthodox test was finally accepted by the ILC. Despite dispute having largely to do with the chronological paradox, the commission decided that the definition of custom in Hudson's working paper (see ch. 1 note 5), represented a viewpoint shared by the members of the

fulfill its requirements, because it is a creation rule with a strongly (even seemingly absolutely) conservative bias.

The specially conservative nature of CIL is, as I have argued, counterbalanced by the peculiar flexibility and indeterminacy of its structure, viewed from a strategic standpoint. On the one hand, the *opinio* requirement is backward-looking. On the other, understood as a body of *language* used strategically, we have seen how old citations can be used in new ways. On the one hand, state practice seems subject to an indefinite number of interpretations; on the other, it is the arena in which we can work out the significance of legal discourse to any required degree of definition.

In this chapter, I will apply the model of CIL change to some specific examples in international law; this will better show the ways in which taking a strategic, pragmatic approach to CIL discourse can help make sense of legal developments that might otherwise appear as mere confusion (or else, pure power politics).

The Robustness of Interstitial Change

commission on the whole, "with some slight shades of difference." *Summary Records of the 40th Meeting*, [1950] 1 Y.B. Int'l L. Comm'n 4, at 6, U.N. Doc. A/CN.4/SER.A/1950 (57.V.3)

Given the importance of law-expressions' moderate generality to the model of CIL change I have proposed, we might expect that a lot of the movement in CIL discourse will center around problematically general concepts. So, we might ask, how exactly does the unclarity of concepts get put to the test, and how does it work itself out? Vaughan Lowe makes the helpful suggestion that CIL changes, at least nowadays, primarily through the articulation and acceptance of what he calls "interstitial norms."² Lowe is right, I think, that such norms are an important engine of change - but his account of this change is lacking. Explaining what it lacks, and outlining an alternative conception of interstitial norms will set us up for the discussion of the particular putative interstitial norm of humanitarian intervention that will follow.

Lowe points out that international law is fairly 'practically complete,' in the sense that its basic principles provide at least a framework for describing almost any currently possible state behavior or relationship.³ There may be significant areas of ambiguity or confusion where international law's guidance is obscure - but there are not conceptual realms of complete lawlessness. So we are unlikely to see real 'expansions' of CIL except in cases where some new realm of activity opens up to which old law does not clearly

² Vaughan Lowe, *The Politics of Law-Making*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 207, 213 (Michael Byers ed., Oxford UP 2001).

³ *Id.* at 208-209.

apply (e.g., as perhaps happened with the internet). Instead, change in CIL mostly progresses through the "emergence of normative concepts operating in the interstices" *between* relatively stable norms of international behavior.⁴ Normative change in CIL will, for the most part, not take the form of entirely new laws - instead, it is more likely to come in the shape of emerging principles governing the interaction or application of existing norms (whether themselves customary or treaty-based). Though Lowe calls these norms "interstitial," it might be more congenial in some ways to call them "reconciling" norms - because of CIL's practical completeness, there will be relatively few cases where we would intuitively want to talk about a 'gap' in the law. Rather, most of the work of interstitial norms will be done in cases where too many norms seem applicable and some way of determining how they should interact is needed, rather than in cases where too few apply. That said, so as not to multiply jargon unnecessarily, I will use Lowe's terminology.

How are we to regard such interstitial norms? Lowe's model, it seems to me, must be wrong (or at least misleading). Lowe claims that interstitial laws have no "independent normative charge of their own."⁵ He seems to base this on the claim that while "primary" norms tell states 'do this' and

⁴ *Id.* at 213.

⁵ *Id.* at 216.

'don't do that,'⁶ interstitial norms do not give guidance for particular non-speech actions. That is, (to use Lowe's example of an interstitial norm), no state is guided directly by the norm, "thou shalt pursue sustainable development." Instead, states are guided by norms directing them to pursue economic growth and to protect the environment - the sustainable development norm simply tells them how to reconcile fidelity to those two primary norms when they come into conflict.

This seems right, and may be enough to establish that interstitial norms do not have any *independent* normative charge - the reasons we have to pursue sustainable development are always, perhaps, parasitic on the reasons we have to pursue economic growth. But Lowe seems to want to go on to claim that they have no normative charge *at all*. According to Lowe, interstitial norms are "simply concepts," and so are not bound by the same criteria of validity as primary norms of CIL - "the very *idea* of sustainable development is enough to point the tribunal towards a coherent approach to a decision in cases where development and environment conflict." In particular, he denies that interstitial norms are legally obligatory, claiming that they are used instead because they are "necessary in order that legal reasoning should proceed."⁷

⁶ *Id.* at 215.

⁷ *Id.* at 217.

Coherent? Perhaps. But that is far from good enough. Surely we could also ask of an interstitial norm that it be *justified*. After all, despite Lowe's claim that "all good interstitial principles" are "capable... of being redefined with infinite flexibility," (a claim he almost surely does not mean in a literal sense - else, how could they do their job any better than reconciling principles on a case-by-case basis?) he points out that, rather than sustainable development, we might have adopted a marketized 'polluter pays' principle.⁸ And it certainly seems reasonable for a party on the losing end of a judgment based on sustainable development to ask *why* 'polluter pays' was not used instead.

It is because interstitial norms function as *reasons* (more precisely, prescriptives) in the pragmatic economy of CIL discourse that it would be intolerable to accept Lowe's contention that they are not generated by the same process as primary norms (and so are not subject to the *opinio* and practice requirements).⁹ If they do not get their justification through the standard process, then they must get it from *somewhere* - or somehow systematically evade challenge. We need a model of how challenges to interstitial norms can be mounted and responded to.

Lowe's will not do. He claims that interstitial norms have no "authors" but instead merely "emerge" from the international legal system. In the first

⁸ *Id.* at 217.

⁹ *Id.* at 219.

place, he seems to mean that they have no authors in the sense that there are no agents given the power to determine new interstitial norms by fiat. But in this sense, states are not authors of the primary norms of CIL either - the *opinio* requirement enforces a backwards-looking demurral of authorship (in my terms, it requires that any law-expression be justified by deference to previously used law-expressions). And, as even Lowe concedes (though he gives the point very short shrift), interstitial norms "do not emerge unaided."¹⁰ *Someone* must issue the law-expressions, and what Lowe refers to as the question of the "validity of the drawing out of the norm" does not seem to be different in kind than the question of the validity of any putative primary norm of CIL. On the one hand, uses of law-expressions by certain agents are more likely to grant reissuance-licenses that will be accepted by other participants.¹¹ On the other, law-expressions that provide attractive resolutions to thorny problems will be greeted more warmly by the practice than those that are less useful. But this is the same process I have already described for CIL in general (the normative life of a law-expression depends

¹⁰ *Id.* at 219.

¹¹ Lowe does raise the interesting issue of how 'permeable' legal discourse is to the actions of non-state actors. I have not taken up the issue of the domain of participants in international legal discourse, primarily because the chronological paradox does not turn on it. He may very well be right that justifying interstitial norms by deferring to the novel law-expressions of, say, powerful NGOs, will tend to get more acceptance than it would in the case of primary norms. This is an interesting possibility, but even if it is true, it would not mean that those interstitial norms were somehow not legally valid (the acceptance of the justification in legal discourse would seem to imply that they *were*).

on whether one can justify it, and whether one is likely to face serious challenges).

Perhaps I should not take Lowe so seriously when he seems to claim that interstitial norms are somehow not 'real' laws. For all his talk of mere conceptual coherency and emergence, he also describes mechanisms for determining which interstitial norms should be adopted. Though he claims that the choice will be made on the basis of "extraneous factors," he opposes this to "the internal logic of the primary norms," so he seems to mean factors extraneous to the conflicting primary norms, not necessarily extraneous to legal discourse in general.¹² First, mongerers of interstitial laws may look to how well the proposed norm coheres with the legal system as a whole. In terms of the pragmatics, this amounts to looking for a law-expression on which discursants will converge, and which will not create too many conflicts elsewhere (perhaps by bringing non-conflictual divergence to a head). But Lowe seems to place more weight on considerations of moral and political desirability.

There are two ways to take this suggestion, both of them bad. One is to take Lowe at his word, that the justification for interstitial laws is purely moral. This would clearly violate the social thesis.

¹² *Id.* at 216.

The other is to take Lowe at his word when he pens passages like this

one:

No one - statesman, judge, or whatever - can switch his or her brain into a purely legal or purely non-legal mode. Brains are brains. The same brain functions as the judge judges, reads newspapers and novels, watches films and television, and does everything else... [interstitial norms] are the most likely to be heavily (I would say overwhelmingly) influenced by non-legal factors. Interstitial norms are the points where general culture obtrudes most clearly into the processes of legal reasoning.¹³

Part of Lowe's point in this passage is to introduce his idea that CIL is being "secularized" - that it is becoming less the exclusive domain of state actors and more open to influence by NGOs, private citizens, etc. So far as that goes, it is an interesting idea. But he also seems to take this observation to support his contention that interstitial laws are not truly normative laws of CIL.

The problem is not that his factual observation about the sociocultural context of legal pronouncements is false (in fact, I suspect that he is correct). But it does not follow from the fact that judges (and, despite Lowe's almost-exclusive focus on tribunals, I would add: and diplomats, state representatives, etc. who are much more prevalent users of international-law-expressions) decisions are partially *explainable* by reference to non-legal and non-normative factors that the law-expressions they use are not normative. That would be to fall into realism, and violate the normativity

¹³ *Id.* at 221.

thesis. Of *course* what state representatives say is influenced by what they think they can get away with, and what they can get away with is influenced by shifting cultural norms and trends that affect the way their interlocutors will react to what they say. But it should be remembered that much of this ambient cultural material comes in the form of shifting judgments about what is *right* or *unacceptable*, and that these judgments come with shifting patterns of reasoning to support them. Contingency does not necessarily undermine normativity (*pace* Plato). My project has precisely been to illuminate how some of this contingency can be *incorporated* into a normative discourse, without undermining it.

In terms of my analysis, we can take on board much of Lowe's observations about the empirical process of interstitial-norm-formation without accepting his conclusions about their lack of normativity.

One major advantage that interstitial norms have, in terms of CIL creation, is that they come with a plausible claim to being already part of the law in virtue of their non-primary status. A state that responds to a challenge by citing the sustainable development norm is in a good position to cite the (generally accepted) economic development norm as backup. Citing the economic development norm will not serve as an acceptable response to challenges of the form "why this reconciliation and not another?" but *will*

generally serve to put the state's action under the color of law in general.

Claiming that someone is mis-reconciling two laws is not the same as claiming that she is not acting under the color of law *at all*. And so it is possible for even contested reconciliations of CIL-expressions to become treated as normative in the discourse if they are able to garner convergent state practice, since the *opinio* requirement has to do with the legal character of the acts in general. In short, users of interstitial law-expressions have at least some limited ability to defer to uses of generally accepted law-expressions.

The contingency that Lowe points out can also work in their favor when challenges are of the "why this interstitial law and not another?" form. If sustainable development is an idea that has come to enjoy broad acceptance among leading intellectuals (including jurists, diplomats, and scholars of international law), we could not directly cite that fact as a legal justification for using it in interstitial law-expressions. But it *would* mean that deploying interstitial-law-expressions based on sustainable development would be much more likely to survive simply because they would be more likely to be taken (case-by-case) as acceptable by participants in CIL-discourse, and hence much less likely to be challenged at all (meaning that they would not stand in need, in the practical sense, of justifications).

On my picture, we should not be as cynical as Lowe is about the possibility that interstitial norms could come to be treated as primary norms. Though interstitial law-expressions are powerful because they can at least partially defer justification to established law-expressions, they need not be forever bound to their 'parents.' In the first place (as we shall see, in the case of humanitarian intervention), the interstitial law-expressions can come to be used as challenges to certain uses of their forerunner expressions - that is, they are not totally normatively parasitic on the understood use of the expressions they were introduced to reconcile. In the second place, there is no reason that they could not come to be regarded as primary expressions in their own right. An interstitial norm that comes to enjoy enough practical convergence that it is no longer subjected to serious challenges will not need to defer to its forerunner law-expressions, and may come to have uses that are independent of them. One example may be the history of the privacy norm in U.S. constitutional law - originally justified in *Griswold v. Connecticut* as a way of systematizing and explaining various other provisions of the constitution¹⁴ (e.g., the 4th amendment rights against search and seizure), and guiding their application to new kinds of cases, it seems plausible to regard privacy as (at least to its defenders) a norm of U.S. law with its own realm of application and robust practice of use.

¹⁴ *Griswold v. Conn.*, 381 U.S. 479, 484-486 (1965).

So, from the standpoint of the pragmatics of the discourse, Lowe's interstitial norms can be seen as a genuine "engine" of CIL change. Which is good, because historically, Lowe seems to be on to something. Given my analysis, we should not be *too* surprised that CIL change tends to come out of the need to resolve practical conflicts - and Lowe seems to be right that this often takes the form of articulating interstitial laws.

In the remainder of this chapter, I will apply my model to a relatively lengthy analysis of developments around one such interstitial law, the (putative) law permitting "humanitarian intervention." While Lowe focuses on the notion of sustainable development (especially as it functions in the *Gabcikovo* case), I think the evolving legal discourse around humanitarian intervention also provides an interesting study in the change of international law. I will begin my analysis by looking at the concept's use in the ICJ case that arose out of NATO's 1999 bombing of the Federal Republic of Yugoslavia, and continue on to discuss how other developments in legal discourse relate to the emerging use of "humanitarian intervention."

Background to the Case

The province of Kosovo occupied a problematic place in Yugoslav politics for years before large-scale violence erupted there. Predominantly ethnic-Albanian, it had been granted special autonomy under the 1974 Yugoslav constitution, but did not gain independence from the remnant of Yugoslavia (as did many non-Serbian provinces) after the death of Marshall Tito in 1980. By 1989, even the limited autonomy Kosovo had enjoyed under Tito was revoked by Slobodan Miloscevic (then president of the province of Serbia, of which Kosovo was a part).¹⁵

While there was a peaceful movement to establish independent Kosovar governance structures (and hence "run the territory in all but name"¹⁶), this did not bring the hoped-for Western support for independence, and the more aggressive Kosovo Liberation Army (KLA) grew in strength. In early 1998, Serb security forces massacred eight-five people, provoking a violent response from the KLA and drawing international attention to the conflict.¹⁷ By October of 1998 approximately 300,000 Kosovars had been forced from their homes by the conflict.¹⁸

Having failed to bring about a diplomatic resolution of the conflict between Serbian forces and the KLA, and citing humanitarian justifications,¹⁹

¹⁵ IVO DAALDER, WINNING UGLY: NATO'S WAR TO SAVE KOSOVO 8 (Brookings Inst. 2000).

¹⁶ *Id.* at 8.

¹⁷ *Id.* at 11.

¹⁸ *Id.* at 23.

¹⁹ NATO press release of March 23, 1999, cited in THE KOSOVO CONFLICT AND INTERNATIONAL LAW 304 (Heike Krieger ed., Cambridge UP 2001) [hereinafter KOSOVO CONFLICT].

NATO began air strikes against Serbia in March of 1999. The air strikes were intended to put pressure on Milosevic (by then president of the Federal Republic of Yugoslavia (FRY), now Serbia and Montenegro) to withdraw his forces from Kosovo,²⁰ but took far longer than (publicly, at least) anticipated, only ending in June of 1999.²¹

On April 29, 1999, the government of the FRY appealed to the ICJ, filing simultaneous applications against the ten NATO powers involved in the bombing (Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the UK, and the USA). The FRY claimed that the NATO bombings violated Geneva Convention civilian protections, the obligation to protect the environment, the 1948 Convention on free navigation on the Danube (because of attacks on bridges), the International Convention on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Prevention and Punishment of the Crime of Genocide (claiming that the bombings partly constituted and also enabled the Kosovar pursuit of genocide against the Serbians), and - most importantly for this discussion - the obligation not to use force against another State or intervene in its internal affairs.²² On the same day, the FRY

²⁰ DAALDER, *supra* note 15, at 101.

²¹ *Id.* at 174.

²² Legality of Use of Force (Serb. & Mont. v. Belg.) 1999 I.C.J. No. 105 (April 29) (Application Instituting Proceedings) (available at http://www.icj-cij.org/icjwww/idocket/iybe/iybeapplication/iybe_application_19990428.html); Legality of Use of Force (Serb. & Mont. v. Can.) 1999 I.C.J. No. 106 (April 29) (Application Instituting

also requested provisional measures enjoining the NATO powers to end the bombing immediately.²³

Proceedings) (available at http://www.icj-cij.org/icjwww/idocket/iyca/iycaapplication/iyca_application_19990428.html); Legality of Use of Force (Serb. & Mont. v. Fr.) 1999 I.C.J. No. 107 (April 29) (Application Instituting Proceedings) (available at http://www.icj-cij.org/icjwww/idocket/iyfr/iyfrapplication/iyfr_application_19990428.html); Legality of Use of Force (Serb. & Mont. v. F.R.G.) 1999 I.C.J. No. 108 (April 29) (Application Instituting Proceedings) (available at http://www.icj-cij.org/icjwww/idocket/iyge/iygeapplication/iyge_application_19990428.html); Legality of Use of Force (Serb. & Mont. v. Italy) 1999 I.C.J. No. 109 (April 29) (Application Instituting Proceedings) (available at http://www.icj-cij.org/icjwww/idocket/iyit/iyitapplication/iyit_application_19990428.html); Legality of Use of Force (Serb. & Mont. v. Neth.) 1999 I.C.J. No. 110 (April 29) (Application Instituting Proceedings) (available at http://www.icj-cij.org/icjwww/idocket/iyne/iyneapplication/iyne_application_19990428.html); Legality of Use of Force (Serb. & Mont. v. Port.) 1999 I.C.J. No. 111 (April 29) (Application Instituting Proceedings) (available at http://www.icj-cij.org/icjwww/idocket/iyfo/iyfoapplication/iyfo_application_19990428.html); Legality of Use of Force (Serb. & Mont. v. Spain.) 1999 I.C.J. No. 112 (April 29) (Application Instituting Proceedings) (available at http://www.icj-cij.org/icjwww/idocket/iyso/iysoapplication/iyso_application_19990428.html); Legality of Use of Force (Serb. & Mont. v. U.K.) 1999 I.C.J. No. 113 (April 29) (Application Instituting Proceedings) (available at http://www.icj-cij.org/icjwww/idocket/iyuk/iyukapplication/iyuk_application_19990428.html); Legality of Use of Force (Serb. & Mont. v. U.S.) 1999 I.C.J. No. 114 (April 29) (Application Instituting Proceedings) (available at http://www.icj-cij.org/icjwww/idocket/iyus/iyusapplication/iyus_application_19990428.html)

²³ Legality of Use of Force (Serb. & Mont. v. Belg.) 1999 I.C.J. No. 105 (April 29) (request for the indication of provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iybe/iybeapplication/iybe_iapplication_iprovmeasures_19990428.html); Legality of Use of Force (Serb. & Mont. v. Can.) 1999 I.C.J. No. 106 (April 29) (request for the indication of provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iyca/iycaapplication/iyca_iapplication_iprovmeasures_19990428.html); Legality of Use of Force (Serb. & Mont. v. Fr.) 1999 I.C.J. No. 107 (April 29) (request for the indication of provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iyfr/iyfrapplication/iyfr_iapplication_iprovmeasures_19990428.html); Legality of Use of Force (Serb. & Mont. v. F.R.G.) 1999 I.C.J. No. 108 (April 29) (request for the indication of provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iyge/iygeapplication/iyge_iapplication_iprovmeasures_19990428.html); Legality of Use of Force (Serb. & Mont. v. Italy) 1999 I.C.J. No. 109 (April 29) (request for the indication of provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iyit/iyitapplication/iyit_iapplication_iprovmeasures_19990428.html); Legality of Use of Force (Serb. & Mont. v. Neth.) 1999 I.C.J. No. 110 (April 29) (request for the indication of provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iyne/iyneapplication/iyne_iapplication_iprovmeasures_19990428.html)

The ICJ rejected the cases against the United States and Spain

immediately (and removed them from its docket) for lack of even *prima facie* jurisdiction.²⁴ While they did not dismiss the other cases, they did deny the FRY the provisional relief it sought.²⁵ The cases essentially languished until

ml); Legality of Use of Force (Serb. & Mont. v. Port.) 1999 I.C.J. No. 111 (April 29) (request for the indication of provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iypo/iypoapplication/iypo_iapplication_iprovmeasures_19990428.html); Legality of Use of Force (Serb. & Mont. v. Spain) 1999 I.C.J. No. 112 (April 29) (request for the indication of provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iysp/iyspapplication/iysp_iapplication_iprovmeasures_19990428.html); Legality of Use of Force (Serb. & Mont. v. U.K.) 1999 I.C.J. No. 113 (April 29) (request for the indication of provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iyuk/iyukapplication/iyuk_iapplication_iprovmeasures_19990428.html); Legality of Use of Force (Serb. & Mont. v. U.S.) 1999 I.C.J. No. 105 (April 29) (request for the indication of provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iysp/iyspapplication/iysp_iapplication_iprovmeasures_19990428.html)

²⁴ Legality of Use of Force (Serb. & Mont. v. Spain) 1999 I.C.J. No. 112 (June 2) (order regarding request for provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iysp/iysporders/iysp_iorder_19990602.htm); Legality of Use of Force (Serb. & Mont. v. U.S.) 1999 I.C.J. No. 114 (June 2) (order regarding request for provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iysp/iysporders/iysp_iorder_19990602.htm)

²⁵ Legality of Use of Force (Serb. & Mont. v. Belg.) 1999 I.C.J. No. 105 (June 2) (order regarding request for provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iybe/iybeorders/iybe_iorder_19990602.htm); Legality of Use of Force (Serb. & Mont. v. Can.) 1999 I.C.J. No. 106 (June 2) (order regarding request for provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iyca/iycaorders/iyca_iorder_19990602.htm); Legality of Use of Force (Serb. & Mont. v. Fr.) 1999 I.C.J. No. 107 (June 2) (order regarding request for provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iyfr/iyfrorders/iyfr_iorder_19990602.htm); Legality of Use of Force (Serb. & Mont. v. F.R.G.) 1999 I.C.J. No. 108 (June 2) (order regarding request for provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iyge/iygeorders/iyge_iorder_19990602.htm); Legality of Use of Force (Serb. & Mont. v. Italy) 1999 I.C.J. No. 109 (June 2) (order regarding request for provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iyit/iyitorders/iyit_iorder_19990602.htm); Legality of Use of Force (Serb. & Mont. v. Neth) 1999 I.C.J. No. 110 (June 2) (order regarding request for provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iyne/iyneorders/iyne_iorder_19990602.htm); Legality of Use of Force (Serb. & Mont. v. Port.) 1999 I.C.J. No. 111 (June 2) (order regarding request for provisional measures) (available at http://www.icj-cij.org/icjwww/idocket/iyus/iyusorders/iyus_iorder_19990602.htm)

2004, and in the meanwhile the FRY underwent a name change to Serbia and Montenegro, along with a change in government that significantly shifted its attitude towards the *Use of Force* cases. Nonetheless, the new government did not withdraw the cases from ICJ consideration. Finally, in December of 2004, the ICJ decided that it did not, after all, have jurisdiction to hear the cases, since the FRY/Serbia and Montenegro was not the successor state to the former Yugoslavia - meaning that it was not a party to the UN Charter and ICJ Statute in 1999 (it became a member in November of 2000²⁶), and hence could not bring suit before the ICJ.²⁷

[cij.org/icjwww/idocket/iyipo/iyipoorders/iyipo_iorder_19990602.htm](http://www.icj-cij.org/icjwww/idocket/iyipo/iyipoorders/iyipo_iorder_19990602.htm)); Legality of Use of Force (Serb. & Mont. v. U.K.) 1999 I.C.J. No. 113 (June 2) (order regarding request for provisional measures) (available at [http://www.icj-](http://www.icj-cij.org/icjwww/idocket/iyuk/iyukorders/iyuk_iorder_19990602.htm)

[cij.org/icjwww/idocket/iyuk/iyukorders/iyuk_iorder_19990602.htm](http://www.icj-cij.org/icjwww/idocket/iyuk/iyukorders/iyuk_iorder_19990602.htm))

²⁶ G.A. Res. 55/12, U.N. GAOR, 55th Sess., U.N. Doc. A/Res/55/12.

²⁷ Legality of Use of Force (Serb. & Mont. v. Belg.) 2004 I.C.J. No. 105 (December 15) (judgment) (available at [http://www.icj-](http://www.icj-cij.org/icjwww/idocket/iybe/iybejudgment/iybe_judgment_20041215.htm)

[cij.org/icjwww/idocket/iybe/iybejudgment/iybe_judgment_20041215.htm](http://www.icj-cij.org/icjwww/idocket/iybe/iybejudgment/iybe_judgment_20041215.htm)); Legality of Use of Force (Serb. & Mont. v. Can.) 2004 I.C.J. No. 106 (December 15) (judgment) (available at http://www.icj-cij.org/icjwww/idocket/iyca/iycajudgment/iyca_judgment_20041215.htm);

Legality of Use of Force (Serb. & Mont. v. Fr.) 2004 I.C.J. No. 107 (December 15) (judgment) (available at [http://www.icj-](http://www.icj-cij.org/icjwww/idocket/iyfr/iyfrjudgment/iyfr_judgment_20041215.htm)

[cij.org/icjwww/idocket/iyfr/iyfrjudgment/iyfr_judgment_20041215.htm](http://www.icj-cij.org/icjwww/idocket/iyfr/iyfrjudgment/iyfr_judgment_20041215.htm)); Legality of Use of Force (Serb. & Mont. v. F.R.G.) 2004 I.C.J. No. 108 (December 15) (judgment) (available at http://www.icj-cij.org/icjwww/idocket/iyge/iygejudgment/iyge_judgment_20041215.htm);

Legality of Use of Force (Serb. & Mont. v. Italy) 2004 I.C.J. No. 109 (December 15) (judgment) (available at [http://www.icj-](http://www.icj-cij.org/icjwww/idocket/iyit/iyitjudgment/iyit_judgment_20041215.htm)

[cij.org/icjwww/idocket/iyit/iyitjudgment/iyit_judgment_20041215.htm](http://www.icj-cij.org/icjwww/idocket/iyit/iyitjudgment/iyit_judgment_20041215.htm)); Legality of Use of Force (Serb. & Mont. v. Neth.) 2004 I.C.J. No. 110 (December 15) (judgment) (available at http://www.icj-cij.org/icjwww/idocket/iyne/iynejudgment/iyne_judgment_20041215.htm);

Legality of Use of Force (Serb. & Mont. v. Port.) 2004 I.C.J. No. 111 (December 15) (judgment) (available at [http://www.icj-](http://www.icj-cij.org/icjwww/idocket/iyipo/iyipojudgment/iyipo_judgment_20041215.htm)

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In the meanwhile, of course, the NATO intervention in Kosovo

continued, ending only with an agreement on Serb withdrawal and the deployment of the Kosovo Force (KFOR) reached on June 9, 1999.²⁸ And some very interesting discussions were had in the oral arguments regarding the *merits* of the FRY's case, even though they were never pronounced upon by the ICJ. In the remainder of this chapter, I will examine how, especially in the course of arguments over Kosovo an attempt was made (by Belgium in particular) to establish a new customary norm that would make humanitarian interventions legally compatible with sovereignty. Because of the messiness of CIL discourse, this discussion will lead us to look not only at Belgium's arguments, but at other ambient developments in the discourse over sovereignty both at the time and in subsequent debates. Let us begin by looking at the debates over Kosovo.

Sovereignty in the Kosovo Record

We do know that we must do more to reach out to our children and teach them to express their anger and to resolve their conflicts with words, not weapons.

- *Bill Clinton, Televised Address of April 21, 1999*

Throughout the diplomatic and legal record regarding the NATO intervention in Kosovo, the concept of sovereignty is danced around.

²⁸ DAALDER, *supra* note 15, at 174.

The law of sovereignty and the law of human rights tend to be antagonistic in cases, like Kosovo, where individuals are threatened by actions of their own government, or by conflicts internal to a nation-state. That is, each law seems applicable, while each seems to entail different normative consequences for action - precisely the kind of situation that is fertile ground for an interstitial law to come into use.

The need for some reconciling, interstitial law is particularly acute because few if any participants in legal discourse are willing to abandon use of either the laws protecting sovereignty or those protecting human rights. And so the legal-diplomatic maneuvering in most cases focuses on the attempt (on the pro-intervention side) to come up with a way of justifying intervention in *this* case as an instance where some reconciling norm permits it. At least, that is, when powerful pro-intervention states do not attempt to suppress an inconvenient discussion of sovereignty entirely.

At least three ways of trying to justify intervention in the face of the challenge posed by the sovereignty norm were trotted out at various points during the Kosovo crisis. Firstly, it was argued that, while sovereignty remained an important restraint in more or less its absolute form, the norms compelling intervention in Kosovo were of such a nature as to trump norms protecting sovereignty - that is, sovereignty is not a justified challenge to

human-rights justifications (or, at least, human rights justifications of a particularly extreme sort). Secondly, it was argued that the intervention was not a violation of sovereignty because it was implicitly authorized by Security Council resolutions - in my terms, that Security Council authorization is a justified response to invocations of sovereignty.²⁹ Lastly, it was argued that the intervention was not justified either because human rights or Security Council authorization superseded sovereignty, but because the intervention was not a violation of sovereignty in the first place. It is this last form of argument that will be most interesting for my purposes.

Though the first two arguments were perhaps the most prominent basis on which the NATO allies made their case, they are less interesting for my purposes than they might be for others. For instance, if it could be made out that the NATO bombings were authorized by the Security Council under chapter VI or VII, this would effectively remove any direct custom-generating power that they might have, as they would be fully legitimated by the Security Council's multilateral-treaty-based power. The propriety of acting

²⁹ The general understanding of this would seem to be that, since the SC is authorized to take action that would normally count as 'aggression' by the charter, member nations of the UN have implicitly consented to any such action, and so it is not a violation of their sovereignty. As noted above, whether or not the FRY was legally a member of the UN in good standing was a matter of some dispute - so it *may* have been possible for the FRY to argue that it was still protected by the customary norms barring aggression, and not bound by the SC's authority (it would be an interesting question whether the SC's authority over UN members is replicated in customary law for non-members). However, since the FRY's ability to bring suit in the ICJ rested on its claim that it was in fact the successor state to Yugoslavia, and hence a member of the UN, this counter-argument was not available to its representatives.

against a state's sovereignty when one can defer to a treaty in which the target state has consented to such treatment (and, in some sense, all treaties limit their signatories' sovereign powers) is well-established, and all signatories to the UN Charter have agreed that the Security Council has the power to impose such penalties.

One caveat regarding my drawing out of the third argument, the reconciling one, is in order: the strategic nature of legal discourse means that ascribing a single coherent argument to any of the parties to the *Use of Force* cases requires a bit of creative reconstruction on my part. For one thing, state actors often deliberately leave their arguments somewhat vague and ambiguous - this often gives an advantage in future flexibility, and is an example of how *all* properties of a law-expression need not be worked out in order to get past some particular conflict or for some particular use to stand. For another, legal discourse is rarely a linear process of clear challenge-and-response exchanges. Rather, it is often in the interest of the representatives of a state to advance (sometimes muddled together) a number of different implicit and explicit justifications of the same act, as this lets them claim justification even if one argument or another is later challenged. That said, let me turn to the most interesting argument from a CIL-change perspective, the one advanced by Belgium's representatives in their oral arguments.

Belgium Pushes the Envelope

The argument that interests me most is the argument that the use of force for humanitarian purposes does not need to be authorized specially or to generally trump sovereignty because it is *not inconsistent with sovereignty at all*. This argument has been made explicitly - to my knowledge - by no state actor other than Belgium. However, the argument has been suggested as a justification for intervention by at least some scholars,³⁰ as well as (at least strongly implied) by Secretary-General Kofi Annan.³¹

As noted above, the *explicit* law-expressions protecting sovereignty against military intervention (and otherwise) are contained in Articles 2(4) and 2(7) of the UN Charter (though, it has been argued³², they now have the

³⁰ For instance, Tesón argues that, "[t]he rights secured by article 2(4) are... not rights held by states autonomously, that is, independently of their moral legitimacy. The protection of human rights is not just a value that is merely superior to state sovereignty. State sovereignty *derives* from individual rights." FERNANDO TESÓN, HUMANITARIAN INTERVENTION 146-147 (Transnational 1988).

³¹ In his 35th annual Ditchley lecture of 26 June 1998. UN Doc SG/SM/6613/Rev. 1, available at <http://www.un.org/News/Press/docs/1998/19980626.sgsg6613.r1.html>.

³² For instance, see *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 14, at 100 (June 27) (judgment): "A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as bring not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that 'the law of the Charter concerning the prohibition of the

status of *ius cogens* and so are customary law binding independent of the charter) - barring "the threat or use of force against the territorial integrity or political independence" of a state and preventing even UN interference in "matters which are essentially within the domestic jurisdiction" of a state.³³ Together, these restrictions are generally taken to express important aspects of the legal protections on sovereignty.

Nonetheless, Belgium, in its oral pleadings in the "Legality of the Use of Force" case, argued that

... we need to go further and develop the idea of armed humanitarian intervention... NATO has never questioned the political independence and the territorial integrity of the Federal Republic of Yugoslavia - the Security Council's resolutions, the NATO decisions, and the press releases have, moreover, consistently stressed this. Thus this is not an intervention against the territorial integrity or independence of the former Republic of Yugoslavia. The purpose of NATO's intervention is to rescue a people in peril, in deep distress. For this reason the Kingdom of Belgium takes the view that this is an armed humanitarian intervention, compatible with Article 2, paragraph 4, of the Charter, which covers only intervention against the territorial integrity or political independence of a State.³⁴

The importance of Belgium's statement here for the development of a putative law-expression permissive of humanitarian intervention should not be underestimated.

First, though Belgium makes reference to the UN Charter, which is a multilateral treaty, it would be a mistake to see Belgium's claims primarily

use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*...

³³ U.N. Charter art. 2, para 4 and art. 2 para 7., respectively

³⁴ Oral Pleadings of the Kingdom of Belgium (Serb. & Mont. v. Belg), CR 99/15 (translation) (May 10, 1999) (available at http://www.icj-cij.org/icjwww/idocket/iyall/iyall_cr/iyall_icr9915_19990510_translation.htm).

through the lens of treaty law. The prohibition on aggression contained in Article 2(4) is widely considered, as mentioned above, to have matured into a norm of customary law, indeed of *ius cogens*. As the ICJ did in the *Nicaragua* case (see fn 39, above), actors looking for the content of the underlying (supervening?) customary rule will generally refer to their understanding of the treaty norm. That is, since treaties are in some cases regarded as giving rise to custom, uses of a customary-law-expression are sometimes linked to understandings of the proper use of a treaty-law-expression.³⁵

Secondly, even were we to concern ourselves solely with the treaty norm expressed in Article 2(4), Belgium's argument would still have a potential customary effect. Belgium's response to the FRY's legal challenge rests on the deployment of an interstitial law permitting humanitarian intervention. As I have argued, such interstitial law-expressions must be able to be justified in the practice, and so are subject to some set of validity conditions. The interstitial law would obviously not be a treaty law, and so (barring the articulation of some entirely new realm of law) should be regarded as part of customary law. Hence, the appropriate way to analyze its

³⁵ The two law-expressions do not always stand or fall together, though. In particular, one reason for discussing the question of whether or not some treaty norm has passed in to customary law is that challenges appropriate to the propriety of a treaty-law-expression are not always considered appropriate to a customary-law-expression. In the *Nicaragua* case (*supra* note 31, at 31-32), the U.S. claimed that the court lacked jurisdiction, since its multilateral treaty reservation barred ICJ resolution of disputes arising under Article 2(4). However, the court ruled that it *did* have jurisdiction over the customary norm of non-aggression that 'mirrored' 2(4), and since Nicaragua had also appealed to that norm, could decide the dispute..

use is with our customary law tools – to look to the ways in which it is used as a justification, how users attempt to defer its own justification to accepted law-expressions, how the usage of the expression changes over time, etc.

Granting that we should understand Belgium's claim as an attempted use of a customary law-expression, any judgment of its propriety should refer to how well it fits within the existing legal discourse. Unfortunately for Belgium, most relevant documentary material speaks against its position. In the *Nicaragua* case, the ICJ only considers self-defense (individual or collective) as a possible exception to the general rule of non-intervention,³⁶ and reads the norm restrictively, claiming that (under some circumstances, though not the ones at stake in *Nicaragua*) providing support to rebel forces can indeed count as the use of "force."³⁷

Three General Assembly resolutions are also relevant to the norms of sovereignty and nonintervention. Since they are non-binding even on member states, Assembly resolutions do not directly generate law, they cannot be appealed to directly as justifications. However, they *are* generally taken to

³⁶ *Nicaragua*, *supra* note 31, at 103. Note, however, that the implication here is somewhat ambiguous. Since the U.S. claimed that its intervention was legal on the grounds that it was undertaken in the name of collective self-defense, it is unclear whether the court regarded self-defense as the only exception to the rule (as some read it) or whether only self-defense was considered, because that was the only argument on the table.

³⁷ *Id.* at 118-119.

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have an impact on the formation of CIL.³⁸ There is some uncertainty regarding exactly *what* their effect is - Schachter, for instance, takes a psychologistic view and considers them "evidence" of CIL (presumably of state *opinio*).³⁹ I would instead prefer to emphasize the character of the General Assembly as "a major instrument of States for articulating their national interests, and seeking general support for them."⁴⁰ In other words, more important than the (uncertain) way in which support for a GA resolution evidences the 'beliefs' of the states whose delegates support them, is the fact that the UN is one of the major fora where the practice of international legal discourse takes place. The uses of law-expressions that gain purchase in GA discussions will have an impact on the proprieties those expressions are understood to have elsewhere - that is, even if no direct appeal to GA resolutions can be made, the understanding of the scope of use of terms like "aggression" as worked out in those resolutions will make a difference to what output proprieties law-expressions involving "aggression" will have.

Theoretical considerations regarding the Assembly aside, it is clear that any argument like Belgium's must reckon with the *Definition of Aggression*,⁴¹ *Declaration on Friendly Relations*,⁴² and the *Declaration on the Enhancement*

³⁸ BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 138 (3d ed., Aspen 1999).

³⁹ SCHACHTER, *supra* ch. 1 note 23, at 89.

⁴⁰ *Id.* at 85.

⁴¹ G.A. Res. 3314, U.N. GAOR, 29th Sess. (1974).

⁴² G.A. Res. 2625, U.N. GAOR, 25th Sess. (1970).

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*of the Effectiveness of the Principle of Refraining from the Threat or Use of
Force in International Relations.*⁴³

All three documents lay out a fairly restrictive reading of the norms concerning use of force, sovereignty, and non-intervention. The *Definition* rules out "any military occupation, however temporary,"⁴⁴ as well as (particularly relevant to the action in Kosovo), "[b]ombardment by the armed forces of a state against the territory of another state"⁴⁵ and declares that "[n]o consideration of whatever nature, whether political, economic, military, or otherwise, may serve as a justification for aggression."⁴⁶ *Friendly Relations* similarly declares that "[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State." And *Non-Use of Force* includes the principle that "[n]o consideration of whatever nature may be invoked to warrant resorting to the threat or use of force in violation of the Charter." These declarations will provide ample material for any state to cite against the use of a law-expression permitting humanitarian intervention. They seem to provide a challenge to any speech act that purports to permit the use of force and rule out of bounds any response.

⁴³ G.A. Res. A/RES/42/22, U.N. GAOR, 42nd Sess., U.N. Doc. A/RES/42/22 (1987).

⁴⁴ G.A. Res. 3314, *supra* note 40, art. 3a.

⁴⁵ *Id.* art. 3b.

⁴⁶ *Id.* art 5.

My goal here (thankfully) is not to establish that Belgium was warranted in its attempt to justify the NATO bombings by deploying a law-expression permitting humanitarian intervention. But I will try to say something about how we should understand the conflict, since it is not the case that Belgium was simply ignoring or attempting to steamroll these obvious-seeming challenges.

Note that Belgium's argument is an interesting attempt to make a sort of 'end-run' around the principles (repeatedly) expressed in the anti-intervention declarations by the world community. Unlike the first sort of approach discussed above (the UK's attempt to claim that there was a norm of humanitarian intervention that *trumped* the norm of non-intervention in the sovereign affairs of states) Belgium is claiming that the NATO intervention *does not conflict* with the sovereign inviolability of states. In other words, Belgium is reacting to the challenge not by attempting to respond to it, but by attempting to challenge the propriety of the sovereignty-based challenge itself. The major difference is that, unlike Britain, Belgium does not admit that there is any conflict in issuing both a speech act affirming the FRY's sovereignty *and* a law-expression permitting the bombardment, and hence (if successful) does not run afoul of the clear declarations that sovereign inviolability beats any consideration one might adduce to violate it.

How is this possible? Belgium's representative is making use of divergence over the proper use of law-expressions involving "sovereignty" in the existing discourse. While everyone agrees that sovereignty is important, this convergence masks the fact that not all participants in CIL discourse agree on what implications that agreement has for particular actions and other law-expressions.

"Sovereignty" in the U.N. Charter

Belgium is making its argument in the context of a practice that already contains some divergence on the proper usage of law-expressions prohibiting cross-border interference. The UN Charter's restrictions themselves, though they are near-universally accepted (that is, few would challenge the propriety of citing them in a legal dispute) did not enjoy perfect convergence on use even at their inception.

The conventional wisdom seems to be that the *travaux préparatoires* (literally, the 'preparatory work;' the legislative history) show that the parties to the UN charter intended Article 2(4) to "prohibit virtually any use of force by a state."⁴⁷ Ian Brownlie, for instance, asserts that, "the view that intervention which does not impair the 'territorial integrity or political

⁴⁷ MICHAEL GLENNON, LIMITS OF LAW PREROGATIVES OF POWER 23 (Palgrave 2001).

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independence' of a state is not prohibited by Article 2(4)... is used by very few lawyers and has long been discredited... [the preparatory materials] make clear that the phrase 'against the territorial integrity' was added at San Francisco at the behest of small states wanting a stronger guarantee against intervention."⁴⁸

But the *travaux* do not present so unified a picture as this makes out. One reason to question the ready identification of looking to the preparatory work and determining the intentions of the preparers is that the framers of the UN charter were not coining terms of art out of thin air, nor were they speaking in code. The phrases "territorial integrity" and "political independence" had a history of usage and meaning before they were inserted into the UN charter. And just as you would not accept it if I said, "yes, I said 'red,' but I meant it with the *intention* of 'green,'" it would be unwarranted to give the intentions of the charter's drafters *carte blanche* control over the meanings of the words they used. This is just to say that, as much as the usage of any interstitial law permitting humanitarian intervention will be affected by general understandings of how to use the words and phrases involved, the Charter's drafters were also not creating words out of thin air.

Anthony D'Amato has undertaken a historical survey of the use of the phrases "territorial integrity" and "political independence" in legal

⁴⁸ Ian Brownlie, *Humanitarian Intervention*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 217, 222-223 (John Norton Moore ed., Johns Hopkins UP 1974).

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documents leading up to the adoption of the charter in 1945.⁴⁹ There was, in fact, a good deal of divergence over the proper use of the terms, and they were not always taken to rule out the use of force on their own. For instance, the Havana treaty between the U.S. and Cuba in 1903 clearly regarded "independence" as compatible with "intervention," as it provided that "the United States may exercise the right to intervene for the preservation of Cuban independence..."⁵⁰ The term territorial "integrity" was also not clearly used to rule out all activity of armed forces on the territory of another state, since "inviolability" was often added in cases where all military action was to be prohibited, as in the 1931 non-aggression pact between Afghanistan and the U.S.S.R..⁵¹ And even in 1945 (the year of the Charter), the record indicates some ambivalence about the content of "territorial integrity" - the Act of Chapultepec defined aggression as an "attack of a state against the integrity or inviolability of territory, or against the sovereignty or political dependence of an American state..." but then went on to *add* that "invasion by armed forces of one state into the territory of another... shall constitute an act of aggression."⁵² Were there no divergence

⁴⁹ ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 57-73 (Transnational 1987).

⁵⁰ Agreement for the Lease to the United States of Lands in Cuba, Feb. 23, 1903, U.S.-Cuba, T.S. 418, art.3; cited in *Id.* at 60.

⁵¹ Non-aggression Pact, Afg-U.S.S.R. 157 LNTS No 3611, 371; cited in D'AMATO, *supra* note 48, at 66.

⁵² Inter-American Conference on War and Peace, *Act of Chapultepec*, 39 AMER J. INTL. L 108, 108 (1945); cited in D'AMATO, *supra* note 48, at 69.

in usage of "sovereignty" and related terms, the addendum would have been superfluous.

So it would be unwarranted to assume that the phrases "territorial integrity" and "political independence" were in unequivocal use, at the time of the drafting, in an absolutist fashion. Whatever the drafters of the UN charter may have intended, they did not *use* law-expressions on which practice converged on an absolutist use when they crafted article 2(4). It is not clear why we should try to look behind what they wrote to find their intention, even if we are looking at the preparatory documents.

In fact, there is evidence that not even narrowing our focus the Charter's framers alone would reveal convergence on an absolute bar on the use of military force. An early draft that would have simply required nations to "settle disputes by none but peaceful means" was *rejected* by the drafters.⁵³ And the Australian Deputy Prime Minister, echoing the phrase "force or the threat of force against the territorial integrity or political independence," introduced by New Zealand, clarified that he understood the phrase to entail only that "no question relating to *a change of frontiers or an abrogation of a state's independence* could be decided other than by peaceful negotiations."⁵⁴

⁵³ D'AMATO, *supra* note 48, at 69.

⁵⁴ *Id.* at 70. Emphasis mine.

Again, my goal is not to adjudicate between Profs. Brownlie and D'Amato, a task I would not presume to undertake here. For my purposes, it does not much matter if a *consensus* of, say, the drafters of the Charter was that 2(4) barred humanitarian interventions. Humanitarian interventions *purport* to neither change frontiers nor abrogate independence. My point is that they can make this claim without *incoherence* because this understanding of the Charter was a live option from the beginning; the discourse over sovereignty has been messy from the start.

"Sovereignty" in the UNSC Resolutions on Kosovo

One area of discourse in which the use of "sovereignty" was already messy was in the existing UN Security Council resolutions on Kosovo. While the direct argument that the Kosovo intervention was implicitly authorized by the Security Council does not hold much interest for the subject of customary law change, the *implicit* limitations on sovereignty that the resolutions embrace does.

Resolution 1199 contains a clause "[r]eaffirming the commitment of all member states to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia," and all the other resolutions contain similar (if not

identical) language. The language is an obvious cite to the language of Article 2(4), and hence presents any action taken under the resolution as consistent with the charter. And so it is of some interest that, at the same time, the resolutions also warn of "further action and additional measures to maintain or restore peace and stability,"⁵⁵ and later authorize an international security force in Kosovo.⁵⁶

The effect of these resolutions on the discourse is not entirely undercut by the fact that it is extremely unclear whether the NATO states were *right* to argue that they implicitly authorized the use of force. Whatever else is true, they *do* seem to contemplate the possibility that force *could* be authorized by the Security Council while still respecting the "sovereignty and territorial integrity" of the FRY. After all, the Security Council is itself, as a UN organ, barred by Article 2(7) from interfering in matters which are "essentially within the domestic jurisdiction of any state."⁵⁷ And no real argument was made that the Kosovo situation involved international aggression by the FRY against any other state. So, either the Security Council itself overstepped its bounds (which few scholars⁵⁸ and no states, to my knowledge, have explicitly claimed), or some inchoate understanding is at work in these resolutions

⁵⁵ S.C. Res. 1199, U.N. SCOR, 3930th Sess., U.N. Doc S/RES/1199 (1998).

⁵⁶ S.C. Res. 1244, U.N. SCOR, 4011th Sess., U.N. Doc S/RES/1244 (1999).

⁵⁷ U.N. CHARTER art. 2, para. 7.

⁵⁸ Glennon voices his relatively rare concern with the scope of the Security Council's powers under Chapter VII of the Charter at GLENNON, *supra* note 46, at 112-113.

permitting the authorization of military force to coexist with the affirmation of sovereignty.

The ultimate effect is to create an additional line of discourse on which Belgium can draw in pushing its own claim that the NATO intervention was not a violation of sovereignty. Though the Belgian counsel did not explicitly link these two aspects of the state's argument, the general acceptance of the Security Council Resolutions as warranted law-expressions within the legal discourse would make it difficult to rule Belgium's proposed interstitial law out of hand entirely.

The resolutions were also exploited by the other NATO powers in their public justifications. For instance, NATO's statement of April 23rd, 1999⁵⁹ statement reaffirmed the organization's "support for the territorial integrity and sovereignty of all countries in the region."

This is a nod to the language of 2(4) and situates (or, at least attempts to) the NATO action as, similarly, undertaken without prejudice to the values of integrity and sovereignty protected by the Article. In the practice of legal discourse, the resolutions represent a possible justificatory 'bridge' between the UN Charter and the expressions NATO deploys in justifying its action - the resolutions imply that there is some way of taking forceful action against the FRY that would not violate its sovereignty or territorial integrity, and NATO's

⁵⁹ Press Release S-1(99)62, cited in KOSOVO CONFLICT, *supra* note 19, at 308.

cite to the resolutions as implicit authorization, as well as their statement's aping of the language the resolutions pick up from 2(4), attempt to situate the bombing as being that sort of non-violating act. Since the resolutions leave the meaning of "further action" and similar language unclear (in terms of my model, states did not converge on and may not even have had determinate dispositions with regard to the actions rendered justified by acceptance of the Security Council resolutions), the NATO powers exploited the opportunity to seize that discursive space.

Which Sovereignty?

Trying to guard the fortress
Of a king they've never seen or met
But all are trained to murder
At the first sign of a threat
- Aesop Rock, "9-5ers Anthem"

In addition to exploiting specifically legal divergence over the use of "sovereignty," Belgium's argument can exploit the equivocal role of the word "sovereignty" in discourse more generally. As Keohane notes (following Krasner), there are at least four different things that we might mean by "sovereignty:"

1. *Domestic sovereignty*: the effective organization of authority within the territory of a given state.
2. *Interdependence sovereignty*: the ability of a state to regulate movements across its own borders.
3. *International legal sovereignty*: the fact of recognition of an entity as a state, by established states.

4. *Westphalian sovereignty*: the exclusion of external authority structures from the decision-making processes of a state.⁶⁰

On this scheme, what Belgium appeals to when they deny that they have used force against "the territorial integrity or political independence" of the FRY is that the NATO action made no attempt to infringe upon the 'international legal' sovereignty of the FRY. No NATO power, that is, suggested that Kosovo should be separated from the FRY, or that the FRY should be annexed to a conquering nation. Regardless of anything else, the international community would still recognize the FRY as a freestanding and independent legal unit. This is an intelligible, if rather thin, understanding of the word "sovereignty" - even if it is not precisely what the FRY means when it complains that its "sovereignty" has been infringed. I will have more to say about the nature of this conflict in a moment.

In defense against those who might complain that Belgium's understanding of "sovereignty" is *too* thin to count as a reasonable interpretation, it should be pointed out that at least since the advent of the UN system (and in most cases before), the three other aspects of sovereignty have been restricted to greater and lesser degrees without necessarily leading to the conclusion that the states involved are no longer sovereign.

⁶⁰ Robert O. Keohane, *Political Authority after Intervention*, in HUMANITARIAN INTERVENTION 275, 285 (J.L. Holzgrefe & Robert O. Keohane eds., Cambridge UP 2003).

While it strengthens the legal effect of sovereignty in many ways - notably by outlawing aggression - the UN system itself represents a restriction on 'Westphalian' sovereignty. The Security Council, along with many less-sexy structures like the International Aviation Commission, have some degree of ability to influence or even constrain⁶¹ the decision-making processes of states. Furthermore, many states have accepted even more significant encroachments on their Westphalian sovereignty in the form of membership in supranational structures like the WTO and European Union. Nonetheless, international legal discourse does not balk at calling States that have accepted such restrictions "sovereign" (the EU may eventually get there, but it is not yet).

Similarly, 'interdependence' sovereignty can be significantly bent without "sovereignty" breaking. Widely-accepted norms protecting refugees from expulsion to areas in which they would face violence already infringe upon an absolute form of interdependence sovereignty.⁶² From the other side, states do not have absolute rights to push people out - they cannot send someone to a nation where they can foresee torture,⁶³ and there is increasing support for preventing the expulsion of individuals who thereby be rendered

⁶¹ Legally/normatively speaking, of course. States do flout even Security Council resolutions from time to time - compliance is always as much a matter of politics and power as it is of norms.

⁶² Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, art. 33.

⁶³ Convention against torture, *entered into force* June 26, 1987, T.I.A.S., art. 3.

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stateless.⁶⁴ These are treaty norms, but especially the protections against rendition to face torture are (as we have seen) often considered to have passed or be passing into customary, if not *ius cogens* status. And even in the case of treaties, the point holds - many states are not so absolutist about their interdependence sovereignty that they see accession to treaties governing their treatment of refugees and stateless persons as abdications of that sovereignty.

"New" Humanitarianism

The world is my expense
The scope of my desire
The party blessed me with its future
And I defend it with fire

- *Rage Against the Machine, "Sleep Now in the Fire"*

The most serious challenges to an absolutist notion of sovereignty are the ones brought against what Keohane calls 'domestic' sovereignty (hereinafter, I will use "sovereignty" to mean domestic sovereignty unless otherwise noted), the exercise of authority within the state's own borders. Belgium's argument stands within a discourse that has increasingly rejected an absolutist usage of "sovereignty" in the domestic sense and accepted

⁶⁴ Convention on the Reduction of Statelessness, *entered into force* Dec. 13, 1975, 989 U.N.T.S. 175, art. 8.

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challenges based on human rights. Since the mid-20th century, the language of human rights has gained increasing acceptance as part of international political (including legal) discourse - and the influence has greatly accelerated since the end of the Cold War. As Chandler notes, "[t]he prioritisation of human rights issues has transformed the language and institutional practices of international relations. International bodies, from the UN and Nato to the International Monetary Fund (IMF) and World Bank, whose mandates may seem to be unrelated to human rights, have integrated these concerns and acted on them in ways unthinkable ten years ago [in 1992]."⁶⁵ Since human rights language purports to condition the state's authority to enforce decisions regarding its own subjects, it represents an encroachment on domestic sovereignty.

Domestic sovereignty and Westphalian sovereignty are deeply intertwined, but they are distinct. The reason I focus so heavily on domestic sovereignty is twofold. First, threats to Westphalian sovereignty, the ability of a state to make its own decisions on internal policy without the interference of outside power structures, look much more like the kind of threats to political independence that Belgium and other would-be humanitarian interveners disavow. Secondly, the features of the discourse that Belgium is exploiting in advancing a law-expression of humanitarian

⁶⁵ DAVID CHANDLER, FROM KOSOVO TO KABUL 8 (Pluto 2002).

intervention represent not so much an interference in the kinds of decisions a state can make, politically, but in a government's ability to enforce those decisions. A fine distinction, to be sure - since we might reasonably ask (especially from given my pragmatic focus) what the upshot of an unenforceable government decision is. But, since the discursive space opened up for Belgium's interstitial norm by the ambient legal discourse depends on the distinction between a government and its people, the gap between what a government can do regarding itself, and how far it can extend its actions to a population, is an important one.

Belgium's argument, and those of later defenders of humanitarian intervention, benefit from changes in the wider discursive world in how sovereignty-expressions are treated. Looking at those changes will help us understand how Belgium's argument represents an event in a (at least potential) CIL-change, but it is important to keep straight the interaction between legally normative law-expressions and other kinds of discursive moves. Lowe was right to focus heavily on the influence of non-state actors on legal discourse, but he misconceived the status of that influence. To the extent that new law-expressions are advanced, their justification must in some way be rooted in the process of CIL-formation, suitably conceived. However, one important idea behind my model of that formation is that *which* law-expressions will be accepted as justified in a discourse is only half the

story. We should also be concerned with what (output) implications they are treated as having, as this is where there is often significant (and productive) divergence. So, while the justification of a law-expression like, "an armed humanitarian intervention is compatible with article 2(4) of the UN Charter," is subject to the appropriate challenges and responses as a putative move within CIL-discourse, how the acceptance of such a law-expression will affect the overall course of the discourse may depend on less traditional factors. It is here that Lowe's observation that "brains are brains" is relevant. Despite the fond hopes of some would-be reformers like Holmes,⁶⁶ legal discourse is carried out in natural language (in fact, I suspect it could not be otherwise, but I will not argue for that claim here). As a result, legal discursants' understanding of how to *use* the terms of legal discourse will be partially determined by the broader use of those terms in the language. This means that, while Belgium could not directly cite non-legal discourse on human rights and sovereignty as *justification for its interstitial law-expression* of humanitarian intervention, it can benefit from shifts in that discourse that affect the understanding of the expression, if justified. It may even be able to cite it as a certain kind of 'semantic' justification - Belgium's lawyers could not say, "look, lots of NGOs have made statements in favor of this kind of intervention," but they could say to someone who accepted the interstitial

⁶⁶ HOLMES, *supra* ch. 2 note 5, at 166.

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norm but disputed an *application* of it, "look, this is just how you use the word 'humanitarian.'" "

The increasing prominence of human rights discourse has had an impact on the overall shape of international legal-political discourse. The UN system, of course, includes both the principles (like Article 2(4) and its CIL shadow) that protect sovereignty and the human rights principles laid down in the Universal Declaration on Human Rights. It has not gone unnoticed that these two sets of principles do not always cohabit peaceably. Chomsky writes that

there is at least a tension, if not an outright contradiction, between the rules of world order laid down in the Charter and the rights articulated in the UD [Universal Declaration on Human Rights]... The Charter bans force violating state sovereignty; the UD guarantees the rights of individuals against oppressive states, though neither the UD nor the enabling resolutions indicate any enforcement mechanism. The issue of humanitarian intervention arises from this tension.⁶⁷

Like many conflicts, this one has often been dealt with by being swept under the rug (and my theory entails that there is, often, absolutely nothing wrong with that strategy). But several factors have increasingly brought the discourse of sovereignty and the discourse of human rights into conflict.

One is the way in which human rights language has been seeping from the practice of NGOs into the practice of states and other 'official' international bodies (such as the aforementioned IMF and World Bank) - and not just into their aspirational rhetoric, but their justifications of action.

⁶⁷ NOAM CHOMSKY, *THE NEW MILITARY HUMANISM* 73 (Common Courage 1999).

Human-rights NGOs have gained increased political clout and visibility, and "[t]oday, there is a uniting of international institutions and NGOs in terms of both assumptions and staff."⁶⁸ As those accustomed to using the discourse of human rights to justify their actions enter the ranks of influential actors, other 'official' actors will find themselves increasingly required to respond in kind if they want to have anything to say at all.⁶⁹ And as human rights norms move from being 'aspirational' norms championed by NGOs but with little impact on state action to norms to which states and other influential actors try to give effect, the question of how commitment to those norms should play out in the practice becomes more pressing.

Another change has been internal to human rights discourse.

'Traditional' humanitarian organizations like the International Committee of the Red Cross relied on state consent. The ICRC understands that it has a "right of initiative" that empowers it to *offer* its services to states whose populations are suffering, but that "[i]t is now generally recognized that State

⁶⁸ ALEXANDER DEWAAL, *FAMINE CRIMES* 65 (Indiana UP 1997); cited in CHANDLER, *supra* note 64, at 22.

⁶⁹ Or may see it to their advantage, once the window is opened. An instructive case is the current wildfire spread of the language of "terrorism." Now that the U.S. has begun justifying its actions in terms of terrorism, others have followed suit. Few nations are willing to gainsay the U.S.' use, and it can no longer easily quash the use of the justification by others without undermining its own legitimacy. So the past few years have seen a rash of groups hastily re-christened "terrorist" - from the Uighur in China to pro-democracy forces in Burma.

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must authorize purely humanitarian relief operations..."⁷⁰ So humanitarian principles are, on the ICRC's understanding of them, compatible with absolute domestic and interdependence sovereignty - the State has ultimate say over who (and what organizations) can enter their territory, and what they can do once there.⁷¹

Chandler fingers *Médecins sans Frontières* (Doctors Without Borders), founded in 1971, as initiating a sea change in the understanding of 'humanitarian' aid, by rejecting the ICRC's policy of political quietism.⁷² In the words of Joelle Tanguay (a former executive director of MSF-USA) and Fiona Terry (the president of MSF-Australia),

MSF, from the outset, chose to step away from the classical Red Cross approach of a "silent neutrality" and sought to put the interest of victims ahead of sovereignty considerations. MSF's determination to speak in public when faced with mass violations of human rights, including forced displacement or forced repatriation, war crimes, crimes against humanity, and genocide, is a defining principle of the organisation.⁷³

The 'new humanitarianism' expressed here does not accept invocations of sovereignty as a response to challenges made in the name of human rights.

⁷⁰ International Committee of the Red Cross, *What does Humanitarian Law Provide for in Terms of Material Assistance to Victims of Armed Conflict* (Oct. 31, 2002), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/88838FE77FE13269C1256CF50054564C>

⁷¹ There are provisions in the Geneva conventions requiring access by aid organizations in conflicts. See Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, August 12, 1949, 75 U.N.T.S. 31, art. 18. But even if a State is obligated to give consent, that does not empower an organization to treat it as if it has given consent when it in fact has not.

⁷² CHANDLER, *supra* note 64, at 75.

⁷³ Joelle Tanguay & Fiona Terry, *On Humanitarian Responsibility* (last visited Feb. 11, 2005), available at <http://www.doctorswithoutborders.org/publications/other/humanitarian.shtml>.

Obviously, MSF is not carrying out armed attacks. But the attitude towards human rights it helped create is still important. The new humanitarian discourse provides a practice in which new challenges to sovereignty are accepted, which seriously diverges from the usage of sovereignty-expressions accepted by the Red Cross and by Article 2(4) absolutists. The mere *existence* of this practice may impact on the broader usage of sovereignty-expressions, insofar as state representatives and international tribunals are increasingly called upon to interact with powerful NGOs.

Increasing the impact of the narrowing of "sovereignty" has been the trend in some quarters toward a broadening of the usage of "intervention." The International Council on Human Rights Policy recently (2001) convened a meeting on military intervention and human rights. One of its working papers lays claim to "intervention" for non-military humanitarians:

Limiting the term intervention to state military action belittles the inspiring variety of effective, non-violent, interventionary tactics and strategies that have been developed by NGOs and governments alike in the face of humanitarian and human rights problems all over the world, covering everything from relief work to conflict resolution to much more. The human rights movement itself has been intervening in the affairs of states since its inception. The states who don't like us are the first to say so! The political power and reach of these words far exceeds what lawyers, politicians and soldiers can make of them.⁷⁴

⁷⁴ Liam Mahony, *Military Intervention in Human Rights Crises: Responses and Dilemmas for the Human Rights Movement* (March 2001), available at <http://www.ichrp.org/ac/excerpts/69.pdf>.

At first glance, a broadening of the use of "intervention" to include non-military intrusion into a state's internal affairs might seem to increase rather than decrease the discursive standing of sovereignty-expressions - intervention is generally used as definitionally opposed to respect for sovereignty, and so this development might seem to provide new ways to challenge even non-military actions undertaken without explicit state consent.

But the effect of binding military and non-military acts together with the same phrase can go either way. In the last chapter, I discussed the importance of similarity in constraining the progress of legal disputes. Often, similarity is a matter of implicit, shared, and case-by-case judgments. But this does not mean that it is impossible to influence judgments of similarity through the discourse. Edward Levi pointed out that "similarity is seen in terms of a word, and inability to find a ready word to express similarity or difference may prevent change in a law."⁷⁵ The reverse goes as well - in terms of the pragmatics of discourse, there is generally a presumption that homonymous expressions used to describe or justify particular acts imply a similarity between the acts to which they relate. If "intervention" comes to be used to cover both military and non-military acts, and non-military interventions are taken as acceptable, the burden will be on the agent who

⁷⁵ EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 8 (U of Chicago 1949).

wishes to challenge a military intervention to *say why* the military act is legally different from its non-military siblings.

Of course, there may be an easy way of saying this - one is military and the other isn't. But if consent is eroded as a prerequisite for nonmilitary interventions, the difference that military support makes may be similarly undermined, since the special badness of military intervention is at least partially linked to the close relationship between a state's authority and its local monopoly on force. A system that disallows the use of police power to eject nonmilitary, humanitarian interventions has already significantly rolled back that monopoly (from a *de jure*, if not a *de facto* viewpoint). This is an especially plausible possibility to the extent that "humanitarian" is used to cover some military activity. If what allows non-military interventions to be justified despite a lack of consent is their humanitarian nature, and that same humanitarian nature can apply to military interventions, the presumption of justification is shifted much more heavily in favor of the defenders of humanitarian intervention.

The 'Responsibility to Protect'

Blame Canada!
- *South Park: The Movie*

One of the more impressive recent attempts to reconcile sovereignty protections with a permissive attitude towards at least some military actions

is the report of the International Commission on Intervention and State Sovereignty (ICISS). The ICISS was created in 2000 by the government of Canada in conjunction with several private foundations, specifically to deal with "the so-called 'right of humanitarian intervention': the question of when, if ever, it is appropriate for states to take coercive... action against another state for the purpose of protecting people at risk in that other state."⁷⁶

Of course, the report was not released until 2001, and so could not have been invoked by Belgium. But the reason we should care about Belgium's argument at all is because of the possibility of re-opening the debate (truncated by the tabling of the ICJ case and the consequent lack of practical point for the state actors involved) in such a way as to defend Belgium's claims and defer to them for justification of actions we may want to undertake *now* - basically, to do with Belgium's case what we will see Belgium attempt to do below with East Pakistan, Uganda, etc. Let me reiterate that my purpose here is *not* to defend Belgium's argument, the Kosovo intervention, or humanitarian intervention more generally. My point is simply to show how a new norm can germinate within the messy areas of divergence in a practice without breaking the practice's continuity - and the

⁷⁶ INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT vii (December 2001), *available at* <http://www.iciss.ca/pdf/Commission-Report.pdf> [hereinafter, RESPONSIBILITY].

report self-consciously takes itself to be part of the same conversation

Belgium was having with the ICJ, citing Kosovo as one of the major incidents requiring a re-thinking of the "intervention dilemma."⁷⁷

What is striking for my purposes is that the ICISS report does *not* proceed by attempting to justify a new humanitarian intervention law-expression that conflicts with, but supersedes, sovereignty. That would involve their claims in the paradox of trying to consciously introduce a change into CIL that could not be justified by appeal to previous usage. Rather, the ICISS is doing something much more in the vein of attempting to articulate and defend an interstitial law. Oscar Schachter bluntly called any understanding of sovereignty (and hence, Article 2(4)'s protection of it in the form of "territorial integrity" and "political independence") that would allow for military intervention on humanitarian grounds "Orwellian."⁷⁸ But, Orwellian though it may be, the idea that sovereignty does not include an absolute right of domestic sovereignty is pervasive and influential, and it is from a non-absolute concept of sovereignty that the ICISS began its work:

The defense of state sovereignty, by even its strongest supporters, does not include any claim of the unlimited power of a state to do what it wants to its own people. The Commission heard no such claim at any stage during our worldwide consultations. It is acknowledged that sovereignty implies a dual

⁷⁷ *Id.* at 1.

⁷⁸ "It requires an Orwellian interpretation of [territorial rights and political independence] to accept the idea that an invader would protect the true will of the people and, hence, would not deprive the invaded State of its independence or territory." SCHACHTER, *supra* ch. 1 note 23, at 118.

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responsibility: externally - to respect the sovereignty of other states, and internally, to respect the dignity and basic rights of all the people within the states... Sovereignty as responsibility has become the minimum content of good international citizenship.⁷⁹

In fact (echoes of the strategy in the Kosovo resolutions, perhaps), the ICISS is careful to reiterate its view that it is *not* attempting to deprecate sovereignty as a concept. Its report asserts that "independent sovereign statehood" is the "organizing principle of the UN system."⁸⁰

Nonetheless, its use of the sovereignty law is different from the use traditionalists make of it. The title of the report alludes to a new twist on the understanding of sovereignty that the ICISS is pressing, an idea of "sovereignty as responsibility." This new idea involves two important deviations from the absolutist notion.

First, it involves a somewhat different understanding of the *basis* of sovereignty - the appropriate justificatory moves that can be made on its behalf - than the absolutist notion. While the absolutist notion of sovereignty is a descendant of the absolute power of kings,⁸¹ the ICISS makes use of a concept of sovereignty that is vested in "the people and in individuals" and embraces "the goal of greater self-empowerment and freedom for people, both individually and collectively."⁸² This sets up possible justifications of

⁷⁹ RESPONSIBILITY, *supra* note 75, at 8.

⁸⁰ *Id.* at 13.

⁸¹ Keohane, *supra* note 59, at 282.

⁸² RESPONSIBILITY, *supra* note 75, at 13.

sovereignty protections as tied to the pursuit of certain goals, rather than to the (legally arbitrary) will of an individual or governing body.

Keohane claims that the major distinction between state-centered and people-centered notions of sovereignty is that the first is *agency-based* and the second is *rule-based*.⁸³ Because people-centered sovereignty is rule-based, it can be disaggregated - that is, the limitation of power in one realm does not threaten the sovereignty as a whole, and there need not be a *single* authoritative decision-maker. I think that he is right about the nature of people-based sovereignty, but gets the order of explanation wrong. Once you have agreed that the basis of sovereignty is the people, the sovereign power *is* fragmented and disaggregated - at least in theory, my neighbor and I each have a share of control over the policy of the United States, though neither of us has final authority. Having a rule-bound system of sovereignty is a necessity of such a disaggregated structure, since it provides a basis for justifying, challenging, and adjudicating different opinions in political discourse - we could not say "whatever the sovereign of the United States says, goes," because we cannot identify the decisions of our composite

⁸³ Keohane, *supra* note 59, at 283. Keohane actually uses the terms 'absolutist' and 'democratic' rather than state- and people-centered. I find this usage uncongenial, however. I have been using "absolutist" to refer to a notion of sovereignty that completely excludes any outside influence, rather than to the authoritarian/monarchical model specifically for which Keohane uses it. And I think it is possible to have systems that meaningfully derive their authority from the mass of the people without being democracies in any everyday sense.

sovereign without a set of rules for who 'wins' when citizens' proposals conflict.

Any way you slice it, a people-centered notion of sovereignty is congenial to the interventionist and inhospitable to the sovereignty-absolutist, because vesting the power in the people of the nation-state necessarily means attributing certain rights to them against agents of their government - unlike the state-centered notion, where to be legitimate just *is* to be in effective control, the people-centered notion opens up conceptual space for the idea of an *illegitimate* government, government that does not obey the rules or serve the purposes of sovereignty.⁸⁴

This is a crucial move. Without disaggregating the *nation* from the *government*, NATO's repeated insistence that "NATO is not waging war against Yugoslavia," and had "no quarrel with the people of Yugoslavia, who for too long have been isolated in Europe because of the policies of their government,"⁸⁵ would have been insane. But though it is a contentious understanding of sovereignty (after all, I remember many people at the time pointing out that one could not bomb a government without also bombing the people who lived under it), it is not one that evidences a lack of mastery of

⁸⁴ A conceptual history of sovereignty would no doubt be interesting and enlightening, but beyond the scope of this paper. Of course, the idea that a government might be illegitimate is nothing new - even the divine right of kings took as its assumption the idea that the king was *really* mandated by G-d.

⁸⁵ NATO Press release of 23 March 1999; cited in KOSOVO CONFLICT, *supra* note 19, at 304. The same language was repeated in almost all NATO releases and official statements re: the air strikes

legal discourse, if potential disconnect between nations and governments is accepted. And there is much evidence that such a disconnect *is* widely accepted - at the very least, it is often honored in the breach. The notion that people have rights against their governments is one that has found purchase in the rhetoric of many states - it is especially prevalent in the Western democracies who spearheaded the intervention, but it is at least rhetorically present in systems that Westerners tend not to associate with 'rule by the people.' Witness, for instance, the prevalence of names like the "Democratic People's Republic of Korea" (North Korea), and the preamble to China's (which strongly opposed the Kosovo intervention as a violation of sovereignty) constitution which says that after the Maoist revolution "the Chinese people took state power into their own hands and became masters of the country."⁸⁶ In essence, emphasizing the people-centered notion of sovereignty makes it possible to claim that, while one may be violating the "sovereignty" of the government, one is not violating the "sovereignty" of the people. This is not yet an interstitial law permitting humanitarian intervention - I have argued that such a law could not come about *solely* through the efforts of a body not fully party to CIL discourse, deferral to whose speech acts will not generally be accepted as a final justificatory move - but it opens more discursive 'space' for one, by defusing certain kinds of

⁸⁶ Constitution of China, *available at* <http://english.peopledaily.com.cn/constitution/constitution.html>.

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challenges to it that might otherwise be mounted on the basis of an absolutist
usage of "sovereignty."

This brings us to the second important 'tweak' to "sovereignty" that the ICISS report makes. The "Responsibility to Protect" does not merely include the empowerment of the people as a theoretical basis for sovereignty and a responsibility of governments - it endorses *conditioning* the sovereign authority of a government on its fulfillment of this responsibility.

The primary way in which states are responsible to their people, as the ICISS sees it, is through the responsibility for "the functions of protecting the safety and lives of citizens and promotion of their welfare."⁸⁷ But this responsibility does *not* lie solely with the individual state - when the territorial state is unwilling or unable to fulfill its responsibility, a "residual responsibility" to fulfill it on the state's behalf "lies with the broader community of states."⁸⁸ As the ICISS report would have it, if a territorial state is "unable or unwilling to fulfill [the responsibility to protect against threats to the welfare of its population] or is itself the perpetrator... it becomes the responsibility of the international community to act in its place."⁸⁹

⁸⁷ RESPONSIBILITY, *supra* note 75, at 13.

⁸⁸ *Id.* at 17.

⁸⁹ *Id.* at 17.

The ICISS is actually uncomfortable calling such action "humanitarian intervention,"⁹⁰ though its disavowal of the term does not seem to have had much effect on the way its recommendations have been taken up into discourse about CIL.⁹¹ Intervention, after all, carries with it the connotations of stepping into something that is not, strictly speaking, one's own affair. By making the 'responsibility to protect' a responsibility of the international community as a whole, and explaining the sovereign state system as a matter of the "practical realities of who is best placed to make a positive difference,"⁹² the ICISS is able to position (what most would call) humanitarian intervention as not only compatible with sovereignty, but not an intervention (in the strict sense) at all - no one is doing anything that they do not already have a right - no, a responsibility! - to do, and no one's sovereignty is being violated - because sovereignty is vested in the population being aided, rather than in the government that has not been living up to its legitimacy-conferring obligations. Rather than the "confrontational" connotations of a "right or duty to intervene," the "'responsibility to protect' is more of a linking concept that bridges the divide between intervention and

⁹⁰ *Id.* at 16.

⁹¹ For instance, Stromseth takes no notice of the rhetorical distinction in her discussion of the ICISS' recommendations on intervention (Jane Stromseth, *Rethinking Humanitarian Intervention*, in HUMANITARIAN INTERVENTION 232, 265-266 (J.L. Holzgrefe & Robert O. Keohane eds., Cambridge UP 2003).

⁹² RESPONSIBILITY, *supra* note 75, at 17.

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sovereignty..."⁹³ The usage advanced is one that locates the badness of most interventions in the way that they violate the rights of a populace, rather than in the way they intrude upon the government's monopoly on enforcement. As a result, accepting the ICISS usage of 'sovereignty' makes an interstitial law permitting humanitarian intervention much easier to justify than it might otherwise be.

The ICISS report is, of course, not law. But it is a good example of how far one can push divergence over the implications of a law-expression that all participants agree is justified, like "all states' sovereignty must be respected." The problem and the opportunity is that, as both Keohane and the ICISS point out (and as Belgium does not draw attention to), there are a *number* of ways of using "sovereignty" - and its associated phrase, "territorial integrity and political independence," - out there in the discourse. For many purposes, which particular set of proprieties one subscribes to makes little difference (and not every participant in the discourse need necessarily have a determinate view on every issue of use) - both absolutists and interventionists tend to agree that powerful states should not simply go around remaking other states to their liking, and that military intervention should be a last resort, etc. But in situations of practical conflict, the divergence can become

⁹³ *Id.* at 17.

important (and, given the analysis in the last chapter, normatively fruitful); and, to some extent, the development of a robust discourse around one's preferred usage makes such practical conflicts more likely, as the usage of one term is linked to more and more others. The influence of human rights discourse especially has built up a robust strand of the understanding of "sovereignty" that is tied to the representation of a national populace, and is not particularly respectful of "domestic" sovereignty (in Keohane's sense), since it is willing to countenance the meddling of outside power structures when it is deemed that those power structures more accurately express the will of and respect the welfare of the populace.

The ICISS report can also be read as developing the notion advanced by humanitarian groups such as MSF that while they may take sides on political questions, they are nonetheless not 'political.' While the humanitarian act must be "free of political influence," it can be a humanitarian act to "witness to the truth of injustice and to insist upon political responsibility."⁹⁴ The idea seems to be that the humanitarian is not political because she is not taking sides with any government or governmental faction against another (not interfering in state-sovereignty), but rather is on the side of the *people*

⁹⁴ James Orbinski, *Nobel Prize Acceptance Speech* (Dec. 10, 1999), available at http://www.doctorswithoutborders.org/publications/speeches/1999/jo_nobel.shtml.

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against whatever state or other power may be threatening them (that is,
defending people-sovereignty).

The ways in which this erosion of the absolutist concept of
"sovereignty" by a human rights discourse that focuses on the rights of people
against their governments can have a broad impact on how legal discourse
progresses has not been lost on the humanitarian movement.

The International Center for Human Rights Policy, for instance,
recently published a report on the policy dilemmas that face human rights
NGOs regarding humanitarian interventions. They report that a major
concern of humanitarian NGOs, especially relief organizations, is that "the
use of the adjective 'humanitarian' in the context of military intervention
legitimizes the use of force."⁹⁵ On the flip side, as mentioned above, one of
the ICHRP's working papers attempts to reclaim the term "intervention" from
its increasingly military connotations. And if it is even fair to say that MSF let
the humanitarian interventionist genie out of the bottle, they have certainly
tried to shove it back in. Dr. James Orbinsky, accepting the Nobel Peace
Prize on behalf of MSF in 1999, insisted that "[t]he humanitarian is not the
military, and the military is not the humanitarian."⁹⁶

⁹⁵ International Council on Human Rights Policy, *Human Rights Crises: NGO Responses to Military Interventions* (2001), available at <http://www.ichrp.org/ac/excerpts/38.pdf>, at 3.

⁹⁶ Orbinsky, *supra* note 93.

Belgium Preaches to the Practice

Belgium's argument, whatever its defects, is neither perverse nor insane. Belgium is simply exploiting messiness in both the underlying practice and in the discourse. The ambient discourse of international law and politics is increasingly tolerant of the claim that "humanitarian" action exists in a non-political realm, and hence the provision of humanitarian aid even against the will of the territorial state's government is not necessarily a violation of its sovereignty. This idea is especially powerful to the extent that it is accepted that sovereignty is 'about' protecting and serving the populace - far from a threat to sovereignty, humanitarianism seems to be an *aid* to sovereignty. But, even though most humanitarian NGOs may resist the move, there is no way to prevent it being a small step from claiming that food aid aimed at preventing or ending a major humanitarian disaster is acceptable to claiming that military 'aid' aimed at a similar effect is acceptable.

The above discussions should, I hope, have demonstrated some of the ways in which the messiness of discourse involving tokens like "sovereignty" and "humanitarian intervention" can be exploited by disputants, without it ever becoming the case that we simply have left one discourse behind and entered a new one for purely 'external' reasons. But this is not quite enough. By the lights of my theory, speech acts are insufficient on their own to

establish or disestablish a law-expression's normative status. The history of discourse will, at most, determine the contours of law-expressions' *universal* outputs - when and whether they can be reissued, and what inferences they justify. In the absence of non-speech practice, the idiosyncratic outputs of those law-expressions, the normative impact they have on particular non-speech acts, will not find practical expression. As a result, unless the user of a law-expression can appeal to at least some cases of particular acts that are taken to be justified or unjustified in light of it, it will have little basis to argue for some particular normative import in the case at hand. In Belgium's case, to give their argument any grip at all, Belgian lawyers would need to appeal to at least some cases in which they could claim that the humanitarian intervention law-expression is the appropriate justifier.

In its pleading,⁹⁷ Belgium cites five incidents as precedent: India's intervention in East Pakistan (now Bangladesh), Tanzania's in Uganda, Vietnam's in Cambodia, and the Economic Council of West African States' (ECOWAS) interventions in Liberia and Sierra Leone.

Some brief background on the cases, to begin.

In 1970, a separatist party won power in then-East Pakistan. The Pakistani army moved in in March of 1971, reportedly bringing mass murder and other human rights violations along with it. India appealed to the UN to

⁹⁷ Oral Pleadings of the Kingdom of Belgium, *supra* note 33.

intervene, but when the organization failed to move, it invaded East Pakistan, drove out the Pakistani army, released political prisoners, repatriated refugees, and established the nation of Bangladesh.⁹⁸

Idi Amin ruled Uganda from 1971-1979, when he was ousted by a Tanzanian (aided by Ugandan exiles) invasion. For eight years, he presided over a regime notorious for its human rights abuses. In 1978, Ugandan troops occupied a strip of Tanzania known as the Kagera salient. Even after withdrawal (after only 15 days of occupation), Ugandan troops continued to harass Tanzanian troops along the border. In 1979, Tanzania invaded, expelled Idi Amin, and established a provisional government of former Ugandan exiles.⁹⁹

In 1975, Pol Pot's Khmer Rouge took control of Cambodia. The Khmer Rouge attempted to forcibly reorganize the country along agrarian lines, killing two million people over three years with starvation, disease, and execution. In late 1978, the Vietnamese army invaded, aided by Cambodian refugees and overthrew the Khmer Rouge, installing a Vietnamese-supported government.¹⁰⁰

In 1989, the National Patriotic Front of Liberia (NPFL, led by Charles Taylor) invaded Liberia from Côte d'Ivoire. By 1990, the NPFL had occupied

⁹⁸ FRANCIS KOFI ABIEW, THE EVOLUTION OF THE DOCTRINE AND PRACTICE OF HUMANITARIAN INTERVENTION 113-114 (Kluwer Law 1999).

⁹⁹ *Id.* at 121-122.

¹⁰⁰ *Id.* at 127-128.

nearly all of Liberia, but was itself locked in conflict with a splinter group known as the INPFL. The civil war claimed thousands of lives, and created 700,000 refugees and 500,000 internally displaced persons. In August 1990, ECOWAS deployed an interventionary force known as the ECOWAS Monitoring Group (ECOMOG) to Liberia. By November, ECOMOG had imposed a fragile truce - after a bloody few months. However, Taylor remained in *de facto* control of much of the country. It was not until 1993 that a more stable peace agreement was worked out by the UN, ECOWAS, and the Organization of African Unity.¹⁰¹

The crisis in Sierra Leone was in part precipitated by the events in Liberia. Charles Taylor decried Sierra Leone's involvement in the ECOMOG intervention in Liberia, and in 1991 rebel groups loyal to Taylor (the NPFL and the Revolutionary United Front, RUF) began making attacks into Sierra Leone.¹⁰² By 1996, forty-seven percent of Sierra Leone's 4.47 million citizens had been displaced by the conflict,¹⁰³ and the destabilization ultimately led to a 1997 coup that brought a military government with ties to the RUF (the Armed Forces Revolutionary Council, AFRC) into power. Under the new government, civil strife and human rights abuses persisted. The Security Council condemned the coup, and by early 1998 ECOMOG intervened on

¹⁰¹ *Id.* at 200-203.

¹⁰² EARL CONTEH-MORGAN & MAC DIXON-FYLE, SIERRA LEONE AT THE END OF THE TWENTIETH CENTURY 126-128

¹⁰³ *Id.* at 129.

behalf of forces loyal to the ousted regime. By the end of February the AFRC government had been removed from power.¹⁰⁴

All these incidents claimed humanitarian motives, but all have a serious defect as precedent. None of them were endorsed or accepted as humanitarian interventions at the time! The ambivalence that writers such as Glennon find in states' 'intentions' is reflected in an ambivalence in their discourse about the event. So we typically find appeals to humanitarian justifications uttered in the same breath as claims that the action was undertaken in self-defense (however weak an argument might be in the offing for the latter). For instance, the ECOWAS Standing Mediation Committee issued a statement on the Liberian intervention that appealed both to the fact that the civil war in Liberia was "holding the entire population as hostage, depriving them of food, health facilities and other basic necessities of life" and to the fact that it led to "thousands of Liberians being displaced and made refugees... and the spilling of hostilities into neighboring countries."¹⁰⁵

The international reaction did not ratify these interventions as humanitarian, either. At best, as in the case of Liberia, some degree of implicit sanction was given after the fact. But even Security Council

¹⁰⁴ *Id.* at 148.

¹⁰⁵ cited in ABIEW, *supra* note 97, at 206.

Resolution 788 (1992) stopped short of unambiguously endorsing the military intervention, contenting itself to commend "ECOWAS for its efforts to restore peace, security and stability in Liberia."¹⁰⁶ In the case of Vietnam's intervention in Cambodia, the Security Council was not able to come to a resolution, but China and the US condemned the intervention, the non-aligned nations called for the withdrawal of Vietnamese forces,¹⁰⁷ and the General Assembly passed a resolution "deeply regretting the armed intervention by outside forces in the internal affairs of Kampuchea [Cambodia]."¹⁰⁸

This defect is, frankly, obvious - too obvious for it to have gone unnoticed by Belgium. Perhaps Belgium's counsel was arguing in bad faith, and "efforts to establish a pattern of state conduct... that might justify reliance upon a 'custom' of intervention are doomed."¹⁰⁹ We can put a more charitable face on Belgium's argument, however. Glennon is right to argue that the value of supposed precedents is problematized by the lack of a body with the power to authoritatively determine the meaning and scope of precedents.¹¹⁰ But he is very wrong to move from the observation that the norms implicit in international incidents cannot be *authoritatively* determined to the claim that there is no "nonarbitrary way to describe state

¹⁰⁶ S.C. Res. 788, U.N. SCOR, 3138th Sess., U.N. Doc. SC/RES/788 (1992).

¹⁰⁷ ABIEW, *supra* note 97, at 129.

¹⁰⁸ G.A. Res. 34/22, U.N. GAOR, 34th Sess.

¹⁰⁹ GLENNON, *supra* note 46, at 82.

¹¹⁰ *Id.* at 51.

V: Belgium, Kosovo, "Sovereignty," "Humanitarian Intervention"
behavior."¹¹¹ Whatever the dispute between Belgium and the FRY over the interpretation of previous international conflicts is, it is not *arbitrary*. The model outlined in the last chapter can help us get a sense of how Belgium's invocation of its precedents can be revisionary and contentious, yet still reasoned and normative. Belgium's interpretation may be a minority one, a radical one, or a totally unjustified one, but it is not an impossible, arbitrary, or confused one.

Given that the law-expression is supposed to be *new*, or at least newly justified (hence, it's a change), how could Belgium refer to *previous* incidents as justified by a humanitarian intervention law? This is where the sloppiness of justificatory timing comes in. In some ways, it was an advantage for defenders of humanitarian intervention that none of the cases to which Belgium appeals - East Pakistan, Uganda, Cambodia, Liberia, or Sierra Leone - were situations that ended without controversy. Rather, they ended with a good deal of acrimony and with unresolved arguments - but eventually a point was reached where no one wanted to challenge the facts on the ground (sometimes because powerful states' interests were not implicated enough, and sometimes, it seems, because the moral case was strong enough that many people thought it best to let the legal one drop).

¹¹¹ *Id.* at 52.

Belgium's lawyers are not entirely explicit about what they see these cases as proving - they seem to be saying that they were justified by a norm permitting humanitarian intervention that was implicit in practice at the time. Taken straightforwardly, this is a somewhat implausible claim, considering that the propriety of humanitarian intervention remains extremely controversial today, and it seems to have been an even more dimly regarded concept at the time of these incidents. However, my model provides an alternate explanation of their relevance. We can see Belgium as, in effect, opening up old controversies - and then providing what it contends is a response to the challenges that were made. The timing is sloppy, but should not be mysterious - any discussion with Belgium's agents about the justification of the interventions it cites will be *about* past events, but will take place in the present. It is possible to connect old controversies with new ones precisely because a controversy can practically end without settling all the possible questions that it raises. If Belgium's invocation of, say, the East Pakistan invasion were successful, it would have two effects. First, it would change the normative status that invasion is taken to have (at least by its detractors). Second, and more importantly, it would also provide a basis for saying that similar acts (such as the Kosovo bombing) should be justifiable (pending further special challenge) by appeal to the humanitarian intervention law-expression.

Granted, even when we understand the significance of these examples as consisting in the kinds of discourse we can have about them now, there is reason to doubt their value. Glennon, for instance, points to the difficulty of categorizing interventions, given that it is highly unlikely that *any* armed intervention is undertaken for a single motive.¹¹² I have already pointed out that legal discourse is a practical and strategic matter - as such, legal actors do not follow the philosopher's practice of seeking the most persuasive argument and sticking to it. It is generally more useful to make as many arguments as possible, so that the failure of one will not leave your strategy high and dry. As such, it is very difficult to say whether or not some intervention was 'really' humanitarian. Difficulties arise from the fact that it may not be possible to identify any single most important cause, state actors may purposefully conceal their intentions, and the reasons offered in discourse are often various (and even mutually inconsistent). So, for instance, Glennon emphasizes that, in addition to his human rights abuses, Idi Amin had (albeit briefly) occupied Tanzania. Furthermore, Amin's rise to power had been at the expense of a personal friend and ally of Julius Nyerere, the president of Tanzania. And Tanzania did not include a requirement that

¹¹² *Id.* at 70-71.

Amin's human rights abuses end in its ceasefire conditions.¹¹³ So it is not clear that the intervention met the motivational requirements to be considered humanitarian.¹¹⁴ Even this caveat has something to tell us, though. Note that we can see interpretations of these cases making the rounds of the discourse and serving as fodder for justification without these sorts of concerns about their character being settled. The role of practice in normative change is a sloppy one of back-and-forth interpretation and disputed readings, not one of slow and steady accretion of precedent.

Furthermore, even if we were to agree that an incident was a genuine humanitarian intervention, questions linger about the proper scope of the incident as a precedent. Belgium seems to be citing these interventions in support of a customary principle that interventions aimed at ending grave human rights abuses are not a violation of sovereignty. But, as Glennon points out, incidents can be read as having broader or narrower implications (that is, convergence on one use does not settle the propriety of *all* uses). For instance, even if we were to accept that the NATO intervention *was*

¹¹³ *Id.* at 72-73.

¹¹⁴ It is not actually clear how much the motivational element should matter. Walzer (MICHAEL WALZER, *JUST AND UNJUST WARS* 104 (2d ed., Basic 1992)), for instance, is willing to treat interventions as humanitarian even if that was not their only motivation so long as they are at least partly motivated by humanitarian concerns. As a matter of legal discourse, I think the relative importance of motive and effect is a matter of the particular input proprieties the discourse assigns to uses of the humanitarian intervention law-expression. If my theory is right, it is not necessarily incumbent on Belgium to work those details out in order to make its point - and I suspect the answer is currently indeterminate, even among defenders of humanitarian intervention.

humanitarian, and justified, and set a significant precedent for CIL, the relevant description of the act is - *pace D'Amato* - not concrete and unambiguous. One might take NATO's intervention as establishing a principle as broad as a blanket one permitting the use of force without prior Security Council authorization, or as narrowly as one permitting only the use of air power by a longstanding military alliance of democracies against a non-democracy with the purpose of stopping genocide (in Kosovo?) without Security Council authorization.¹¹⁵ At least two discursive moves are available to Belgium's interlocutors. On the one hand, they could deny that the cited cases were justified interventions. On the other, they could advance a different interstitial law to reconcile the act with sovereignty - and then Belgium would have to mount a separate argument as to why its proposed interstitial law was the (legally) superior one.

If I am right, however, these possibilities are moot because no one *did* advance an alternate interstitial law. In terms of the pragmatics of argumentation, Belgium only has to respond to challenges that are actually made. In fact, it is not clear that Belgium's argument did meet with much success, and the dismissal of the case makes it less likely that the argument will in fact have a far reaching normative impact on the discourse. Nonetheless, it is a case in which we can see the backwards-looking

¹¹⁵ GLENNON, *supra* note 46, at 51.

possibilities of justification at work, taking advantage of the permanent possibility of mistake embedded even in stale controversies. The fact that no interstitial law has arisen is an entirely contingent matter, and the possibilities remain open.

Conclusion

On the face of it, Belgium's argument in the *Use of Force* case, and those advanced by latter-day defenders of humanitarian intervention, may seem laughable - or at least outright revisionary. Nonetheless, humanitarian intervention has become a concept gaining ground in international legal discourse, rightly or wrongly. This situation might seem, well, paradoxical - and it is, on the standard understanding of CIL-change. If *opinio* were *really* a matter of state belief, Belgium (or its designated believers) would have to be insane to believe that human rights concerns were recognized as limitations on a state's immunity to armed intervention.

However, looking at the discourse from the standpoint of pragmatics tells a different story. What Belgium tried to do was advance a new interstitial law, and at least partially defer its task of justifying that speech act onto widely used expressions of sovereignty and human rights law. Several factors supported its ability to do this.

First, other legal actors were using sovereignty in a somewhat equivocal, messy, divergent way - including both the representatives of the world community in other authoritative Security Council resolutions on Kosovo, and the drafters of the UN Charter whose sovereignty protections an interstitial law permitting intervention would limit. Belgium could therefore cite other law-expressions as justification. Even where not everyone would agree with Belgium's use of those expressions, that disagreement grounds a *challenge* to Belgium's use, but does not render it irrational or confused. Discursants are bound by their responsibility to respond to actual challenges, not limited to only unchallengeable uses of language.

Second, general discourse about law and politics has shifted in such a way that more and more actual participants understand sovereignty as being subject to limitations, especially because of the growing acceptance of non-synonymy between a government and its people in legal discourse. Belgium - and other defenders of humanitarian intervention - could not cite this general shift in usage directly as support for its interstitial law, but it governs the sorts of challenges that will be deemed appropriate. To the extent that our general understandings of sovereignty include an implicit exception for humanitarian reasons, a law-expression of humanitarian intervention is less likely to face challenge, and more likely to find a use in the discourse that can be justified.

Lastly, Belgium was able to try to put some flesh on the bones of its interstitial law by citing specific acts that it took to fall under its ambit. This has two potential effects. On the one hand, those who accept the case-by-case justification of, say, the Indian intervention in East Pakistan, must either challenge Belgium's characterization of it as justified by the humanitarian intervention norm, or let Belgium cite it as an accepted use of that norm (which then supports its current usage). On the other hand, which future acts would be justifiable by citing a humanitarian intervention law-expression will be constrained by understandings of similarity to the cases cited - so Belgium is able to advance an expression with content (that is, with some constraints on its idiosyncratic outputs) while not being bound to give (*per impossible*) an exhaustive description of its scope... allowing the expression to be manipulated in potentially fruitful ways in the future, should it become an accepted part of CIL-discourse.

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Man must prove the truth, i.e., the reality and power, the this-sidedness of his thinking, in practice. The dispute over the reality or non-reality of thinking which is isolated from practice is a purely scholastic question.¹

At the end of all this discussion, what have I shown?

The idea that customary international law could be created by the uncoordinated activity of states, be dynamic, and be genuinely normative - all at the same time - is not, as some have held, incoherent. It is irreducibly mysterious only if we insist on ramming all legal language into either a descriptive mold better suited for empirical statements or into an imperative mold better suited for commands. We can describe the law, and legal agents often command, but what we are doing when we cite *rules* of law is something different entirely. It is a fundamentally messy business of trying to find some way to work through the practical disputes we have with others, in a way that everyone can accept as justified (or at least live with). Rules organize disputes not by standing above and binding them, but by getting down in the mix themselves.

In the case of customary international law, we should welcome this messiness. Yes, it means that the resolutions of disputes based on principles

¹ KARL MARX, *Theses on Feuerbach*, in THE PORTABLE KARL MARX 155-156 (Eugene Kamenka ed., Penguin 1983).

of customary law will often be shaky and slapdash, always in danger of being stripped for the materials of future disputes. But there is also a virtue in this sloppiness - it lets legal disputants set up rules that are good enough to manage disputes for the moment, without being paralyzed by the lack of a completely specified principle or an authority to which everyone is willing to defer. The rules we can use change over time, because the practical upshot of the rules we *have* used is always a little bit malleable, a little bit open-textured. This is not a defect in the rules, or in our understanding of them - properly understood, it's just a feature of the sorts of rules that we humans are able to put together on our own. Making a system of law more rigid and comprehensive does not necessarily make it better - sometimes it will be a *virtue* to have a system whose particulars can be worked out as the occasion demands, so long as it does not go so far as to allow its users to justify anything and everything.

Importantly, the fruitful messiness of customary law doesn't mean that we must violate rules to change them, or that change is something for which good (from the later standpoint at which we assess the change, of course) legal reasons cannot be given - change happens in the interstices and ambiguities, via acts that are neither clearly legal nor illegal, and under principles that we advance while taking a wait-and-see attitude toward their content.

At the end of all this discussion, what do I have to show for it?

As the last chapter shows, re-thinking some of the theoretical foundations of customary international law is not going to immediately give us a better, easier, less controversial way of figuring out whether or not some rule is really part of customary law. The truth is probably the opposite (for ease of use, no theory could improve on Koskeniemi's options of there being no customary law, or it being whatever we say it is). And no theory of law will change the minds of those who are willing to simply ignore the law when it is inconvenient. So, for a pragmatist theory, my view may seem disappointingly lacking in practical upshot.

This would be a partly but not entirely fair conclusion to reach. The writers of the U.S. Restatement, for instance, would not mention the chronological paradox if it were not a problem. There are, I suspect, legal actors of good faith whose best attempts to puzzle out the contours of customary law are thwarted by its obscure nature. I've given no new test, but I hope at least I've given a new theoretical lens to work with. And I would hope that better theories of customary law, that can avoid some of the incoherencies like the paradox, will bring around those actors of good faith

who have abandoned the idea of customary international law not because of cynicism but because of despair at its murky epistemology.

My theory may also be of some small help to those thinkers who, far from rejecting the value of international law, place too easy a faith in it. It's a commonplace, to which I have referred, that customary international law prohibits torture. Yet, it is equally well-attested (if not more so) that torture continues to be rampant. You should be wary, dear reader, of any theory of the law that tells you this is not a problem - not just a moral problem, but a problem with the *law*. In international legal discourse, we certainly do allow claims to be justified or challenged on the basis, e.g., of a citation of the torture norm. But too often, that discourse is disconnected from the practice of states. There is a danger in letting a discourse grow robust while also growing isolated - a pragmatic perspective on disputes can show us how we can practically get by disputes without really resolving them, but also how disputes can get resolved without any really practical upshot. If I am right, the normative structure of a discursive practice like customary law is supported first and foremost by participants' practical commitment to it. Such commitment is especially fragile when there are great advantages to be gained by eroding the non-speech demands of a discourse. There's a danger of ending up with lots of talk about torture at the same time that "torture" becomes practically vacuous.

In this respect, we should pay particular attention to the *limitations* of the analysis of humanitarian intervention in terms of the emergence of customary norms. At the end of the day, undertakings like the “Responsibility to Protect” are of little value if they are *mere* bits of discourse. Whether or not a norm permitting intervention emerges, and whether or not we should welcome such a norm, we should be worried if our discourse about the law of intervention is not practically involved in international disputes. This is not John Austin’s worry about threats – or not just. Direct enforcement is not always necessary for a discussion to make a difference, but detailed debates about norms need to be tied to particular situations of conflict (not just to make a difference, but to get a content). We should have similar concerns about most reformist projects that operate through international law, including human rights discourse more generally. As much time and energy should be spent on organizing practice as on articulating norms, and we should accept that sometimes the practice needs to run ahead of the norms, to give law-expressions a context in which to take root.

But these reflections are rapidly taking me beyond the scope of the project. The import I can claim for my essay is rather more modest. We don’t have to give up on customary law. We can understand customary law change as normative, and with that understanding think better about how to

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change it without breaking the practice and rendering it truly incoherent. It's a mess, but not a hopeless one.