WHY DO NATIONS OBEY CUSTOM?

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Why do nations obey custom? The conventional model of the law of nations or customary international law (CIL) countenances a separation thesis that CIL is comprised of two discrete elements: state practice (usus) and a legal consciousness (opinio). This Article argues that the separation thesis is attributable to the time-honored philosophical dilemma in comprehending the reality known as Cartesian "mind-body" dualism. As innocuous as it might sound, the dualism-inspired separation thesis tends to generate grave conceptual and practical quandaries, such as the circularity and dogmatic competition between the two constitutive elements, i.e., state practice and legal consciousness. This Article submits that state practice and state mind should not be separated in the first place, and aims to reinstate an ontological unity between the two elements to better ascertain CIL. The holistic and dynamic thesis proposed by this Article focuses not on the static substances comprising CIL, but on the evolving relations among states leading to the development of CIL. In a given legal community (nomos), each CIL rule undergoes a normative life-cycle: rule-formation (externalization), rule-recognition (objectivation) and rule-following (internalization). Under this sociological approach, a particular behavioral pattern among states emerges from a shared belief in its legal reality. Such behavioral regularity among states, once performed, in turn further strengthens the original belief of legal bindingness.

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I. Introduction

Nations want their actions to be seen as lawful. The Russian invasion of Ukraine in February 2022 sparked renewed interests in the law of nations or customary international law (CIL).[1] On the one hand, the Russian invasion blatantly violated the principle of sovereign territorial integrity.[2] On the other hand, Russia attempted to justify its transgression in the name of collectively defending the occupied areas such as Donetsk and Luhansk that it recognized as independent states.[3] Tellingly, both Ukraine and Russia relied on CIL rules, such as territorial integrity and self-defense, to vindicate their own positions. Yet, how do we know whether such CIL rules ever exist? CIL only emerges gradually among nations, in contrast with a treaty that is created by a sovereign contract in a legislative manner. By its nature, the provenance of CIL has remained an enigma. Interestingly, a century-old American Supreme Court case reveals a clue.

In April 1898, at the heart of the Spanish-American War, the U.S. Admiral William Sampson ordered the capture of two civilian fishing vessels (*Paquete Habana* and *Lola*) sailing under the Spanish flag in Cuba's territorial waters.[4] These two ships were eventually auctioned as prizes of war in a district court. In

1. Customary international law, as a source of international law, is referred to as "international custom" under Article 38 of the Statute of the International Court of Justice. Its pre-modern usage was the "law of nations," borrowed from the Roman law concept of jus gentium. The United States Constitution lists the law of nations as a different source of international law from treaties. This article uses the law of nations, international custom, and customary international law interchangeably.

2. Ingrid (Wuerth) Brunk, International Law and the Russian Invasion of Ukraine, Lawfare (Feb. 22, 2022), https://www.lawfaremedia.org/article/international-law-and-russian-invasion-ukraine.

3. Putin Describes the Attack on Ukraine as an Act of Self-Defense, NPR (Feb. 24, 2022), https://www.npr.org/2022/02/24/1082736117/putin-describes-the-attack-on-ukraine-as-an-act-of-self-defense.

4. The Paquete Habana, 175 U.S. 677, 678–679 (1900).

the subsequent lawsuit launched by the Spanish ship owners, the United States Supreme Court struck down the capture as a violation of the law of nations. Justice Gray, writing for the majority, held that the law of nations would prohibit the United States government from seizing civilian vessels even in times of war. Justice Gray unearthed such a rule from a time-honored tradition of the same practice by states, tracing back to Henry IV of England and Louis XIV of France. He also noted that such usage is met with "common consent of mankind" before forming a settled rule of international law.[5]

Justice Gray, like many jurists after him, appears to have adopted, albeit implicitly, a legal fiction ("anthropomorphism") that states are capable of subjective experience. Treating a state as if it is a human is useful in making sense of international law and international relations because it helps generate useful knowledge about them, on practices like cooperation, negotiation, and compliance.[6] Importantly, anthropomorphism led Justice Gray to model the state mind after the human mind, thereby stumbling, unbeknownst to him, into the Cartesian mind-body dualism. He treated sovereign nations as entities that retain both psychological understanding and material extension. His CIL formula connotes on the one hand a physical foundation, and on the other hand a mental foundation, exemplified by the "common consent of civilized communities"[7] entitling a certain behavioral regularity among states to the legal power.

Indeed, this dualist approach has become orthodoxy. Article 38 of the Statute of International Court of Justice codifies the dualist framework and defines CIL as "general practice accepted as law."[8] To wit, CIL is comprised of both a general

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5. *Id.* at 711.

6. *See generally* Alexander Wendt, *The State as Person in International Theory*, 30 Rev. Int'l Stud. 289 (2004) (elaborating on the "useful fiction" of state personhood). A separate legal mechanism ("attribution") is necessary to connect the reality, such as actual commissions or omissions by government officials, to the fiction (an anthropomorphized state); *see also* G.A. Res. 56/83, annex, Draft Articles on Responsibility of States for Internationally Wrongful Acts, ch. II (Dec. 12, 2001), corrected by U.N. Doc. A/56/49(Vol. I)/Corr.4 (setting the parameters for attributing types of conduct to a State).

7. The Paquete Habana, 175 U.S. at 711.

8. 14 Karol Wolfke, Custom in Present International Law 116 (2d ed. 1993) ("The ascertainment and formation of customary international law are of necessity closely interrelated, since, on the one hand, the process of

pattern of conduct by states ("general *practice*") and a legal consciousness shared among states that those conducts are legally binding ("*accepted* as law"), which is dubbed "*opinio juris*."[9] Both the International Court of Justice[10] and most international law scholars[11] subscribe to the same position.

This conventional formulation of CIL dovetails with the "separation thesis" in that the two constituent elements, i.e., state practice and legal consciousness, are treated as mutually independent. While the separation thesis may sound as innocuous as dualism itself, it has generated grave conceptual quandaries in identifying CIL rules. One such quandary is knowing the existence of *opinio juris* requires a prior knowledge of state conduct that is in conscious conformity with the putative CIL rule.[12] Similarly, to locate state conduct that complies with

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formation determines the means of identification of customary rules, and on the other, the action of ascertaining custom or its elements influences its further development. This interdependence is already evident from the content of Article 38"); Gennady M. Danilenko, *The Theory of International Customary Law*, 31 GERMAN Y.B. INT'L L. 9, 11 (1988) ("Art. 38 reflects the agreement of all members of the international community on basic constituent elements required for the formation and operation of customary rules of international law, namely, practice, on the one hand, and acceptance of this practice as law, on the other.").

9. While the full version of this Latin terminology is *opinio juris sive necessitates*, it is often abbreviated as *opinio juris*. *See, e.g.*, North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20) (defining *opinio juris* as the feeling of "conforming to what amounts to a legal obligation").

10. *E.g.*, S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7); Jurisdictional Immunities of State (Ger. v. It., Greece intervening), Judgment, 2012 I.C.J. 99, ¶ 55 (Feb. 3); *North Sea Continental Shelf,* 1969 I.C.J. ¶ 77; Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, 1985 I.C.J. 13, 29 (June 3); Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 97 (June 27); Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 64 (July 8).

11. *E.g.*, OPPENHEIM'S INTERNATIONAL LAW: VOLUME 1 PEACE 25–31 (Robert Jennings & Arthur Watts eds., 9th ed. 2008); ANTONIO CASSESE, INTERNATIONAL LAW 153–169 (2d ed. 2005); MALCOLM N. SHAW, INTERNATIONAL LAW 72–93 (6th ed. 2008); JAMES R. CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 23–30 (8th ed. 2012); LORI DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 59 (5th ed. 2009); JAN KLABBERS, INTERNATIONAL LAW 26–34 (2013).

12. *See* ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 66 (1971) ("How can custom create law if its psychological component requires action in conscious accordance with law preexisting the action?"); *see also* Christian Dahlman, *The Function of Opinio Juris in Customary International*

the putative CIL rule requires a prior knowledge of *opinio juris*. Therefore, identifying a CIL rule is prone to circularity.

Moreover, the separation thesis forces an unwarranted dogmatic competition between the two constitutive elements. They appear mutually interchangeable as each one strives to represent CIL in an exhaustive manner. Accordingly, one element is likely to eclipse the other when identifying a CIL rule. Some scholars prioritize a belief of legal obligation (*opinio*) over state conduct (*usus*), arguing that it is the former that distinguishes the latter from mere courtesy.[13] Others would contend that the most important element of CIL is state practice, which, if conspicuous, may obviate the need for *opinio juris*.[14]

The fragile conceptual framework of CIL immediately leads to practical quandaries, such as when and where one would identify a CIL rule as well as whether such identification should be based on usage or legal belief, or both. Locating a CIL rule requires two separate pieces of evidence, proving the existence of *opinio juris* in addition to proving the existence of state practice. Nonetheless, the dogmatic competition between *opinio* and *usus* tends to single out only one of these two elements, depending on one's preference. For example, in the *Paquete Habana*, those who prefer usage to legal belief would be inclined to prove the knowledge of state practice on that particular maritime issue, while those who prefer legal belief to usage would attempt to adduce the knowledge of the existence of common consent among states that such practice is legally binding.

Law, 81 Nordic J. Int'l L. 327, 329–30 (2012) (viewing that "states follow the practice because they recognize it as a norm of international law").

13. *See, e.g.*, Christoph Kletzer, *Custom and Positivity: An Examination of the Philosophic Ground of the Hegel-Savigny Controversy*, *in* The Nature of Customary Law 125, 130–37 (Amanda Perreau-Saussine & James Bernard Murchy eds., 2007) (introducing a classical philosophical position that deems state practice as an "epiphenomenal" sign of the genuine collective legal consciousness of a legal community); *see generally* Brian D. Lepard, Customary International Law: A New Theory with Practical Applications (2010) (extrapolating *opinio juris* from general principles from various international declarations as well as preparatory works in the treaty-making process).

14. *See generally* Comm. on Formation of Customary (General) Int'l Law, *Statement of Principles Applicable to the Formation of Customary (General) International Law*, 69 Int'l L. Ass'n Rep. Conf. 712, 724, 751 (2000) [hereinafter *Statement of Principles*] (noting how most members of the Committee considered the most important component of customary international law to be state practice).

It is because of this confusion and the ensuing controversies that both scholars and practitioners of international law approach CIL with jaundiced eyes.[15] This CIL skepticism undermines both the descriptive clarity and normative force of CIL as a source of law, entailing a radical proposal to eliminate it as a source of international law.[16] Admittedly, many international law scholars attempt to overcome these dilemmas by advancing various reconciliatory accounts on these competing constituents.[17] They seek to develop a coherent theory of CIL by

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15. *See, e.g.*, Joel P. Trachtman, *Reports of the Death of Treaty Are Premature, but Customary International Law May Have Outlived Its Usefulness*, 108 AJIL UNBOUND 36, 37 (2014) (observing that "CIL is increasingly ill-fitted to respond to the needs for [an] international law of cooperation."); Joel P. Trachtman, *The Growing Obsolescence of Customary International Law*, *in* CUSTOM'S FUTURE 172, 172 (Curtis A. Bradley ed., 2016) [hereinafter Trachtman, *The Growing Obsolescence*]; Robert Alford, *Customary International Law is Obsolete*, OPINIO JURIS, (Nov. 29, 2014) (citing Trachtman, *The Growing Obsolescence*, *supra*), http://opiniojuris.org/2014/11/29/customary-international-law-obsolete/; *see also* Stephen J. Choi & Mitu Gulati, *Customary International Law: How Do Courts Do It?*, *in* CUSTOM'S FUTURE 117, 147 (concluding that international judges simply "ignore" the CIL definition comprised of two elements as such definition appears "analytically impossible to apply and normatively unattractive"); Monica Hakimi, *Custom's Method and Process: Lessons from Humanitarian Law*, *in* CUSTOM'S FUTURE 148, 149 (Curtis A. Bradley ed., 2016) (criticizing that the CIL formation is "so heavily *un*disciplined and *dis*ordered") (emphasis original).

16. *See* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 452 (2000) (arguing that "customary international law should be eliminated as a source of international legal norms and replaced by consensual processes").

17. *See* Michael Wood (Special Rapporteur on the Formation and Evidence of Customary International Law), *First Report on Formation and Evidence of Customary International Law*, at 55 n.259, U.N. Doc. A/CN.4/663 (May 17, 2013) (citing reconciliations of traditional and non-traditional visions of CIL); *see also* John Tasioulas, *In Defense of Relative Normativity: Communitarian Values and the Nicaraguan Case*, 16 OXFORD J. L. STUD. 85 (1996) (developing a quantitative spectrum between state conduct and state mind based on Frederic Kirgis's "sliding scale" model of CIL); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 784–91 (2001) (offering a "reflective interpretive approach" in synthesizing state conduct and state mind); ALEXANDER ORAKHELASHVILI, THE INTERPRETATION OF ACTS AND RULES IN PUBLIC INTERNATIONAL LAW 100 (2008) (observing that "the field of customary law does not tolerate any strict separation of naturalism and positivism, and the proper understanding of this field cannot be reached on the basis of adherence to one of these doctrines to the exclusion of the other"); Anja Seibert-Fohr, *Modern Concepts of Customary International Law as a Manifestation of a Value-Based International Order*, *in* UNITY AND DIVERSITY IN INTERNATIONAL LAW 257, 278 (Andreas Zimmerman & Rainer

synthesizing usage and legal belief through a reflective spectrum between the two constituents. They may identify a particular CIL rule by pinpointing a corresponding coordinate in this spectrum. Nonetheless, these attempts still hinge upon mutual substitutability between the two constituents and therefore continue to suffer from the anthropomorphic sin of Cartesian dualism. Hence, those CIL rules defined by this new reconciliatory approach remain controversial because they are based on the same problematic premise.[18]

Against this background, this Article purports to shed novel light on contemporary debates on CIL by unearthing their hidden philosophical foundations. Recurring controversies on the two constituent elements of CIL represent a surface revelation of more fundamental issues. Granted, previous studies have significantly enriched the understanding of CIL. They nonetheless gave short shrift to the root cause of these debates—the Cartesian mind-body dualism—which is ultimately responsible for the foregoing conceptual and practical dilemmas. The mind-body dualism problematically assumes that the mind is a mechanical phenomenon,[19] as if it were a thinking *thing* or a "ghost in the machine."[20] Yet, *opinio juris* is not in and of itself an independent entity that causes a certain mental status but

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Hofmann eds., 2006) (viewing that "there are difference in the formation of customary international law does not necessarily jeopardize the unity of international law").

18. Roberts, *supra* note 17, at 782.

19. *See* Alexander Wendt, Social Science as Cartesian Science: An Auto-Critique from a Quantum Perspective, in Constructivism and International Relations 182 (Stefano Guzzini & Anna Leander eds., 2005) (problematizing the conventional assumption that "mind is somehow a classical mechanical phenomenon").

20. "It is perfectly proper to say, in one logical tone of voice, that there exist minds and to say, in another logical tone of voice, that there exist bodies. But these expressions do not indicate two different species of existence, for 'existence' is not a generic word like 'coloured' or 'sexed.' They indicate two different *senses* of 'exist' . . . . The dogma of the *Ghost in the Machine* . . . maintains that there exist both bodies and minds; that there occur physical processes and mental processes; that there are mechanical causes of corporeal movements and mental causes of corporeal movements." Gilbert Ryle, The Concept of Mind 11–12 (Routledge 2009) (1949) (emphasis added). *See also* Luke O'Sullivan, *The Idea of a Category Mistake: From Ryle to Habermas, and Beyond*, 42 Hist. Eur. Ideas, 178, 191 (2016) ("Calculative or instrumental rationality was being extended beyond its proper sphere in the socio-economic order, just as the language of mechanism had been extended beyond its proper sphere in relation to the mind-body problem.").

rather a propensity that could be inferred by meeting certain conduct-based criteria.[21] Subscribing to this hidden philosophical assumption, international jurists are inclined to treat state mind (*opinio*) and state practice (*usus*) as mutually comparable, and even mutually substitutable.

To overcome such ontological rivalry between state practice and state mind in identifying CIL, this Article argues that these two constituent elements are not meant to be separated in the first place, and thus proposes to reinstate ontological unity between them. A holistic approach to CIL commands a macro construction beyond a solipsistic notion of a state based on sovereignty. Only when we depart from this agency-oriented paradigm and embrace a "social" framework in identifying CIL can we understand the true nature of CIL as a dynamically interconnected mechanism in which *opinio* and *usus* mutually constitute each other.[22] State practice is "not thoughtless" and state mind is "not disembodied."[23] CIL rules "are not just in the minds of the actors but are out there in the practices themselves."[24]

The holistic social thesis yields two broader implications, both theoretical and pragmatic—it upholds international legal pluralism and neutralizes potential epistemic bias in identifying CIL. First, the conceptual emancipation from this bifurcated bondage enables us to locate international customs in their numerous pedigrees and formats.[25] Those customs may come from international organizations; for example, the World

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21. Albert Hofstadter, *Professor Ryle's Category Mistake*, 48 J. PHIL. 257, 262 (1951) (accusing dualists of confusing differentiated causation and criterion of distinction).

22. Regarding a classical view on this communitarian conceptualization of CIL, see CLYDE EAGLETON, INTERNATIONAL GOVERNMENT 45–48 (1948).

23. ETIENNE WENGER, COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY 48 (1998).

24. Charles Taylor, *Interpretation and the Sciences of Man*, 25 REV. METAPHYSICS 3, 27 (1971).

25. *See* Roozbeh B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173, 175 (2010) (arguing that the recent jurisprudence of international criminal tribunals has gradually seeped into CIL rules in a way which transcends the traditional constitutive requirements of state practice and *opinio juris*); B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT'L L. 1, 10 (2018) (contending that the recent surge of international tribunals warrants "a sustainable theory of CIL that provides firm justification for their use").

Trade Organization (WTO) recognizes the "GATT *acquis*"[26] or "customary practices followed by the Contracting Parties to GATT 1947."[27]

Second, the social thesis protects the normative integrity of international custom from its widely documented structural limitations. As discussed above, international custom is prone to a recurring criticism that it might not be the states themselves as social agents but analysts-observers (such as judges and commentators) that formulate and construct the custom.[28] To some, this might be tantamount to replacing state mind with jurist mind where international custom reflects the reality perceived by jurists, not states. As Chief Justice Fuller noted in his dissent in *Paquete Habana*, "speculations . . . of the writers on international law" or "their lucubrations" might be "persuasive, but not authoritative."[29] In the same vein, Robert Jennings laments that much of the alleged *new* international law is not so much a custom as an innovative "policy decision."

Yet, the social thesis proposed by this Article observes that international custom originates not from an interpreter's own culture, but from a prevailing culture among states in a given community. By refocusing on the community of states and rediscovering an international organization as a representation of such community, we can reinstate a deserved place of real agents ("states") in identifying customs. The rich institutional record of interactions among states registered within an international organization provides a solid empirical foundation for *state* practice, not that of jurists. Such superstructure of state practice is capable of dispelling potentially abusive deductive speculation by jurists and helps states identify their own customs.

Against this background, this Article unfolds in the following sequence. Part I demonstrates how the main dilemmas in

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26. Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, WTO Docs. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, at 14 (adopted Nov. 1, 1996).

27. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, art. XVI, § 1.

28. *See also* Emily Kadens & Ernst A. Young, *How Customary Is Customary International Law?*, 54 Wm. & Mary L. Rev. 885, 894, 912 (2013) (exemplifying acts of courts and judiciaries deriving customary rules); The Paquete Habana, 175 U.S. 677, 696 (1900) (deriving custom from the writings of commenters and historians).

29. *The Paquete Habana*, 175 U.S. at 720 (Fuller, J., dissenting).

identifying CIL are attributable to Cartesian dualism. This Part argues that dualism is responsible for the conventional separation thesis between state conduct (*usus*) and state mind (*opinio*), which eventually drives the two constituent elements into ontological competition. Part II then explains how such ontological competition allows one element to subsume the other and thus distort legal images of CIL. Those who prioritize state conduct are likely to employ positivist methodologies in identifying CIL rules at the risk of scientism. In contrast, those who prioritize state mind tend to highlight moral foundations of CIL rules at the risk of relative normativity. In response, Part III attempts to synthesize the two constituent elements by adopting a sociological approach. According to the new social model, state conduct and state mind are not two separate properties of a CIL rule but just two manifestations of the latter. The new social model of CIL also introduces a life-cycle of a CIL rule: externalization, objectivation, and internalization through a dialectic relationship between the two constituents. This Article concludes that the social thesis can breathe new doctrinal life into CIL by heralding global legal pluralism via sector-specific custom nurtured within a particular international organization.

II. Mind-Body Dualism and the Law of Nations

The very idea of international law, including international custom, is based on the premise that states may, and do, comply with it. Since compliance logically requires a certain cognitive status, such as knowledge, belief, and will, it also postulates the existence of state *mind*, or a "capacity for first-person, subjective experience."[30] As the International Court of Justice once declared, "the States concerned must . . . *feel* that they are conforming to what amounts to a legal obligation."[31] Likewise, the opposite notion of states' continuous denial of being bound by certain rules ("persistent objector") equally presupposes the existence of state mind.[32] Indeed, this legal fiction of state

30. Wendt, *supra* note 6, at 296. Regarding consciousness generally, see David Chalmers, The Conscious Mind (1996).

31. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20) (emphasis added).

32. Regarding the notion of "persistent objector," see generally Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International*

mind, broadly defined as "anthropomorphization," both pervasive and indispensable in constructing international law.[33] States may consent,[34] apologize[35] or even retaliate, as humans do.[36]

The logical corollary of anthropomorphism is "dualism." States' performance of an action, such as rule formation (production) or rule following (reproduction), is divided into two separate realms: material and mental. Suppose that the Ministry of Foreign Affairs made an official statement in the United Nations General Assembly that its country unreservedly condemns genocide. Its statement may translate into an event or a state action that is empirically verified. On the other hand, a unique psychological status may be ascribed to that speech act: the country knows and believes that genocide is a binding rule of international law, not just a matter of courtesy or good manners. This dualism, while seemingly innocuous at first, creates a plethora of controversies in understanding and practicing CIL. Surprisingly, this conceptual and operational confusion around CIL may find its source in philosophy. The anthropomorphist foundation of CIL and dualism as its logical corollary renders international custom exposed to a millennia-old philosophical puzzle—that is, the "mind-body" problem: how one can ever locate a place for the mind in a basically physical world.[37]

Plato once maintained a sharp distinction between soul (form) and body (matter), while his pupil Aristotle took an

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Law, 56 BRIT. Y.B. INT'L L. 1 (1986); Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. J. INT'L L. 457 (1985) (describing the limited use but future potential of persistent objector status in international law); Asylum (Colom./Peru), Judgment, 1950 I.C.J. 266, 277–78 (Nov. 20) (acknowledging Peruvian repudiation and non-adherence to a potential customary rule); Fisheries (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18) (holding that a customary rule could not apply to Norway because "she has always opposed any attempt to apply it").

33. *See* ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS 289–96 (1999) (discussing consequences and assumptions of the concept of states existing as individuals).

34. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (detailing extensively the conditions under which States consent to be bound by an instrument).

35. *See* G.A. Res. 56/83, *supra* note 6, art. 37 (suggesting that states have the capacity to apologize, express regret, or be humiliated).

36. *See id.* art. 49 (implying that states can take countermeasures).

37. JAEGWON KIM, MIND IN A PHYSICAL WORLD: AN ESSAY ON THE MIND-BODY PROBLEM AND MENTAL CAUSATION 2 (2000).

integrative view between the soul and body.[38] While these ancient philosophers struggled with the mind-body problem, it was René Descartes who brought this philosophical enigma to the fore. According to Descartes, body is an extended entity like a stone or tree that retains physical properties of size, shape, weight, etc. In contrast, mind is a "thinking thing" that holds cognitive facility such as affirming and doubting, which cannot be defined by those physical properties. Descartes believed the mind and body interact by a two-way operation. The mind can cause bodily movements. For example, when I feel thirsty, I reach out to a glass of water. In turn, bodily operations can cause perceptions in the mind. For example, operation of my optical nerves can make me see the trees.[39]

This Cartesian dualism has been a source of various philosophical controversies. Attributing the corporeal framework, which is native to bodies (*res extensae*), to souls, has left an indelible legacy of "methodically treating souls in exactly the same way as bodies and as being connected with bodies as spatiotemporal realities."[40] According to Edmund Husserl, this absurdity was the root of the "crisis" of European sciences.[41] Subsequently, Gilbert Ryle offers a more lucid illustration of the Cartesian dilemma under the illustrious banner of a "category mistake."

> A foreigner visiting Oxford or Cambridge for the first time is shown a number of colleges, libraries, playing fields, museums, scientific departments and

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38. *See* Christopher Shields, *Soul and Body in Aristotle*, 6 OXFORD STUD. ANCIENT PHIL. 103, 104 (1988) ("Aristotle believes that form and matter are one.").

39. *See, e.g.*, 2 RENE DESCARTES, THE PHILOSOPHICAL WRITINGS OF DESCARTES 19 (John Cottingham et al. trans. 1984), ("But what then am I? A thing that thinks."). Regarding other discussions on the Cartesian dualism and causal relations between mind and body, see MARGARET WILSON, DESCARTES (1978); BERNARD WILLIAMS, DESCARTES: THE PROJECT OF PURE ENQUIRY (1978). Some scholars believe that Descartes' dualist thesis is close to that of Aristotle in that Descartes also took a unified view over mind and body. For example, see Paul Hoffman, *The Unity of Descartes' Man*, 95 PHIL. REV. 339 (1986).

40. EDMUND HUSSERL, THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY 214 (David Carr trans., 1970) (critically observing that the Galilean physics only offers prediction based on induction, through a "self-enclosed natural causality," without achieving the true meaning of the pre-given "life-world").

41. *Id.* at 212–13.

> administrative offices. He then asks 'But where is the University? (…)' It has then to be explained to him that the University is not another collateral institution, some ulterior counterpart to the colleges, laboratories and offices which he has seen. The University is just the way in which all that he has already seen is organized. When they are seen and when their coordination is understood, the University has been seen.[42]

To Ryle, a linguistic confusion between mind and body is analogous to mistaking concrete things, such as "colleges, libraries, playing fields, museums, scientific departments and administrative offices"[43] for an abstract concept that denotes a particular way in which those things are organized or reconciled.[44] Mental states concern what they *do*, rather than what they are made of, as implied in the Cartesian "thinking thing" (*res cogitans*).[45] In other words, mind is not a certain mental *thing* which causes a certain mental status; instead, a certain mental status could be inferred by meeting a certain conduct-based criterion.[46] A mind is not "another set of operations shadowing those of ordinary life." Instead, it is a "matter of a person's tendencies and abilities to do certain sorts of things."[47]

CIL is also vulnerable to this Cartesian relic to the extent that anthropomorphism provides a logical foundation for its doctrinal dualism. As discussed above, the normative structure of international custom features two separate factors: a material, external dimension, which focuses on state practice, and a mental, internal dimension, which focuses on state mind or *opinio juris*. Under this dualist view of CIL, state conducts tend

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42. Ryle, *supra* note 20, at 6.

43. *Id.*

44. *But see* Stuart Hampshire, Book Review, 59 Mind 237, 240 (1950) (Reviewing Ryle, *supra* note 20) (viewing this in terms of a "metaphor," not a mistake, since it is the "constant transfer of terms from application in one kind of context to application in another" and therefore a necessary part of ordinary language).

45. This "equalization" thesis is nothing but "physicalistically oriented naturalism" that "the soul – its subject matter – was something real in a sense similar to corporeal nature, the subject matter of natural science." Husserl, *supra* note 40, at 63, 212–15.

46. Hofstadter, *supra* note 21, at 262.

47. *Id.* at 257.

to be juxtaposed and compared to a cerebral operation. Feeling bound by a legal obligation "must be construed as signifying the occurrence of non-mechanical processes."[48] It is in this line of thought that *opinio juris* is tantamount to the "ghost in the machine"[49] as a thinking *thing*, as corresponded with state practice. Thus, traditional scholars of CIL tend to implicitly develop an analytical proclivity that parallels and eventually confuses "doing" (as substantiated by state practice) with "theorizing" (as symbolized by *opinio juris*) in the intellectual formulation and operation of CIL.[50]

Conduct concerns perception, and is therefore empirical, while *opinio juris* denotes signification, and is thus symbolic. *Opinio juris* is not as a solipsistic ghost (*cogito*) capable of its own causal agency, but just a manifestation of emergent relationship, such as intersubjectivity or the way certain state conducts are organized.[51] Nonetheless, a category mistake renders these two originally incommensurable concepts mutually substitutable. This is how CIL's dualism invites bitter antinomies between the two concepts. Interestingly, these antinomies manifest themselves in a way which is associated with relevant "ontological" positions.[52] A legal reality around a particular CIL rule tends to be conceptualized only through one element. In other words, the concept of state practice tends to hyperbolize its positivist underpinnings in inducing CIL from state conducts, while the concept of *opinio juris* tend to overstate its naturalist foundations in constructing CIL based on moral theories of CIL.[53] Consequently, one concept may "swallow up" the other.[54]

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48. RYLE, *supra* note 20, at 8.

49. *Id.* at 21.

50. *Cf. id.* (discussing why "doing" and "theorizing" are considered separate processes).

51. Hofstadter, *supra* note 21, at 258–59.

52. Howard Robinson, *Dualism*, *STAN. ENCYC. PHIL.* (Sept. 11, 2020), https://plato.stanford.edu/archives/fall2020/entries/dualism/.

53. *See* Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 79–81 (2007) (discussing the natural law tradition of international custom in earlier times).

54. HUSSERL, *supra* note 40, 231–32.

Some scholars prioritize *usus* over *opinio*,[55] while others prioritize *opinio* over *usus*.[56]

This ontological rivalry between two constituent elements tends to skew CIL to either extreme, preventing them from speaking to each other in a coherent fashion, creating both conceptual and practical confusions, and eventually undermining normative integrity of CIL itself. For example, this ontological struggle has led international scholars to identify two different types of CIL in a rather divisive fashion—i.e., non-human rights and human rights CIL whose ontological trigger is state conduct (*usus*) and state mind (*opinio*), respectively. Regarding the former, scholars use labels, such as "old," "empirical," "traditional," and "dinosaur," while regarding the latter, they use "new," "non-empirical," "modern," and "dynamo."[57] The next Part elucidates various *prices* Cartesian dualism and the consequent separation thesis force international custom to pay.

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55. *See, e.g.*, Anthony D'Amato, *Customary International Law: A Reformulation*, 4 Int'l L. Theo. 1, 1 (1998) ("Instead of trying to work within the notion of *opinio juris*, I should have discarded it entirely."); Lazare Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 Brit. Y.B. Int'l L. 127, 129–30 (1937) ("[W]hether international custom arises only from an activity which is exercised under the impression that it is required by law. There are some very good reasons for doubt on this point").

56. *See, e.g.*, Bin Cheng, International Law: Teaching and Practice 223 (1982) ("The main thing, therefore, is to recognise that usage (*consuetude*) is only evidential, and not constitutive, of what is commonly called 'international customary law,' however else one may wish to label it."); Andrew T. Guzman, *Saving Customary International Law*, 27 Mich. J. Int'l L. 115, 153 (2005) ("CIL is really about the *opinio juris* requirement and not the practice requirement.").

57. A number of scholars adopt this distinction, from both a thematic and chronological, perspective. Curtis Bradley and Jack Goldsmith portray contemporary prevalence of human rights law as "new CIL" in that it depends increasingly less on state practice. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997). In a similar fashion, J. Patrick Kelly offers a notion of "non-empirical CIL." Kelly, *supra* note 16, at 454. By the same token, Anthea Roberts ascribes non-HR CIL to "traditional" CIL and HR CIL to "modern" CIL. According to her distinction, traditional CIL spotlights the role of state practice (*usus*) in the formation of CIL, while modern CIL emphasizes that of opinio juris (*opinio*). Roberts, *supra* note 17, at 757. In a similar manner, David Fidler refers to the traditional custom to the "dinosaur" perspective in terms of its anachronistic nature risking extinction and the modern human rights custom to the "dynamo" perspective in terms of its active, contemporary nature. David Fidler, *Challenging the Classical Nature of Custom*, 39 German Y.B. Int'l L. 198, 216–24 (1996).

III. Challenging the Cartesian Law of Nations

Under the dualism, an observer should ascertain states' successful performance of a behavioral pattern (state practice) as well as states' reason (*opinio juris*) that would command such performance.[58] Thus, from a methodological standpoint, identifying a CIL rule appears to demand two independent realms of inquiry: one concerning *explaining* a coherent, causal, relationship among multiple incidences and the other regarding *understanding* a particular cognitive status of states in executing such performance.[59] The original category mistake tends to generate another mistake: confusing explanation and understanding.[60] Thus, jurists, as observers, are likely to conflate the description of state conduct with normative inevitability.[61]

A. *Data-Driven International Custom*

Some international jurists are inclined to heed a regular pattern out of a reservoir of behavioral data and readily extrapolate a generalizable CIL rule from that pattern. In other words, a significant amount of standard conducts in an identifiable situation—characterized as general, regular and

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58. *Cf.* Alasdair MacIntyre, *The Idea of a Social Science*, in Rationality 112, 117 (Bryan Wilson ed., 1970).

59. This epistemological struggle (*Methodenstreit*) is not new as it dates back to the era of Max Weber. *See* Charles Camic et al., *Introduction* to Max Weber's Economy and Society: A Critical Companion 5 (Charles Camic et al. eds., 2005) (describing Weber's "so-called *Methodenstreit*, or war of methods" as one between generalization and particularization); *see also* Georg Henrik von Wright, Explanation and Understanding (1971) (suggesting that human action is better understood by contextual intent than by natural laws). Regarding a skeptical view on the epistemic distinction between the two concepts, see Karsten R. Stueber, *Understanding Versus Explanation?: How to Think about the Distinction between the Human and the Natural Sciences*, 55 Inquiry 17 (2012).

60. "Both [Jürgen Habermas and Stephen Toulmin] were opposed to the reduction of all forms of understanding to a single model proposed in the project of a single unified science commonly associated historically with Cartesianism and in contemporary philosophy with the logical positivism of the Vienna circle." O'Sullivan, *supra* note 20, at 190.

61. *Cf.* Julia Tanney, *Rethinking Ryle: A Critical Discussion of the Concept of Mind*, *in* Ryle, *supra* note 20, at xxxix [hereinafter Tanney, *Rethinking Ryle*] (noting that constructions of "mental conduct" that suggest "hidden processes" are mistaken conflations).

persistent—reaches a critical point and then transcends into CIL.[62] In essence, it is an empirical process: we may obtain a CIL rule that looks like a formula, such as "if X, then Y."[63] The existence of a certain CIL rule offers a predictive indication that it will cause a certain type of state action conforming to CIL.[64] Rationalists tend to seek such a scientific formula. Their disciplinary assumptions, such as materialism and methodological individualism, would treat states as if they were electrons that react to physical force in a regular, predictive pattern. To them, a cognitive element (*opinio juris*) may work only as "a foil to add cogency" to the latent causal mechanism which a rationalist analysis might reveal by tackling state practice.[65]

This rationalist perspective of international law is widespread.[66] For example, rational choice theorists postulate that

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62. *See* Asylum (Colom./Peru), Judgment, 1950 I.C.J. 266, 336 (Nov. 20) (dissenting opinion by Azevedo, J.) ("[C]oncordant cases, by their number, would clearly reveal an *opinio juris*."); Right of Passage over Indian Territory (Port. v. India), Judgment, 1960 I.C.J. 6, 83 (Apr. 12) (dissenting opinion by Armand-Ugon, J.) ("A fact observed over a long period of years . . . acquires binding force and assumes the character of a rule of law."); *Right of Passage over Indian Territory*, 1960 I.C.J. at 40 ("This practice having continued over a period extending beyond a century and a quarter . . . satisfied that that practice was accepted as law by the parties and has given rise to a right and a correlative obligation.").

63. *See* Jean D'Aspremont, Formalism and the Sources of International Law 162 (2011) ("[A] bottom-up crystallization process that necessitates a concurring and constant behaviour of a significant amount of States accompanied by their belief (or intent) that such a process corresponds with an obligatory command of international law"); Luigi Condorelli, *Customary International Law: The Yesterday, Today, and Tomorrow of General International Law*, *in* Realizing Utopia: The Future of International Law 147, 148 (Antonio Cassese ed., 2012) ("[I]t is the operation that consists in gathering evidence to prove the social effect of the rules in question").

64. *See generally* Carl G. Hempel & Paul Oppenheim, *Studies in the Logic of Explanation*, 15 Phil. Sci. 135 (1948) (discussing the predictive forces of explanation).

65. Bryan R. Wilson, *A Sociologist's Introduction*, to Rationality vii, at viii (Bryan R. Wilson ed., 1970).

66. *See generally, e.g.*, Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005) (positing the theory, generally, that international law emerges from states acting *rationally* to maximize individual interests); Guzman, *supra* note 56 (describing the actions of rational states and the consequences on the development of customary law); George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 Am. J. Int'l L. 541 (2005) (positing rationalist theory and describing how customary international law affects state behavior); Edward T. Swaine, *Rational Custom*, 52 Duke L.J. 559

states tacitly consent to the rule of CIL only because doing so would make them better off.[67] Accordingly, a state will comply with CIL *only* if the payoffs from compliance are greater than the costs of breach.[68] Thus, every time a state encounters a CIL situation, it would undergo a complicated calculus that takes into account a number of factors, such as the benefits of compliance, the costs of violation (such as sanctions), and possible reciprocal breaches from other states.[69] It is this sophisticated calculation informed by reciprocity which eventually increases a state's payoffs from compliance. Andrew Guzman makes a typical rationalist assumption that states' interests are exogenously given and do not emerge endogenously. Guzman posits that states are "unaffected by the legitimacy of a rule of law" and have not "internalized a norm of compliance with international law."[70] According to Guzman's theory of CIL, there is no *opinio juris* per se as an internal status of normativity. Instead, this concept reduces to an incentive (payoff) structure in a repeated prisoners' dilemma situation.[71] According to this position, while interstate cooperation via CIL may affect payoffs, "[s]tates have no innate preference for complying with international law and will only comply when doing so makes them better off."[72]

Under rationalism, states approach CIL in a behaviorist pattern. States are causally hardwired to respond to a certain stimulus, such as material interests. States would mechanically follow CIL rules in strict adherence to a preprogramed payoff matrix. Subjectivity or mental status, such as identity or culture,

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(2002) (employing the rationalist model and attempting to square it with traditionalist doctrine).

67. *See* ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 25, 121 (2008) ("Our basic rational choice assumptions imply that states will only enter into agreements when doing so makes them (or at least, their policy-makers) better off.").

68. *See id.* at 86–88 (discussing the cost-benefit analysis of compliance with international law).

69. *See id.* at 36–40, 45, 47–48 (examining possible factors for determining the value of compliance).

70. Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT'L & COMPAR. L. 379, 380 (2006).

71. *See* Harlan G. Cohen, *Can International Law Work?: A Constructivist Expansion*, 27 BERKELEY J. INT'L L. 636 (2009) (critiquing Andrew Guzman's rationalist thesis based on "reputation" on the grounds that it under-explains the widespread practice on international human rights law).

72. Guzman, *supra* note 67, at 17.

is bracketed or suppressed. This ontological assumption of instrumental rationality leads to a positivist (empirical) methodology native to natural science. Rules of CIL, as if they were laws of physics, may be distilled in a generalized form from episodes (data) of state behavior by observation. This is a typical observer-independent perspective, which harbors a "realist and unromantic outlook."[73]

Although this scientific approach to CIL may sound plausible in an abstract sense, it might not escape from inherent challenges endemic to empirical investigation and generalization. How could one establish a meaningful connection among those scattered, anecdotal episodes of state behavior to formulate a coherent theme of CIL?[74] Here, anthropomorphism bites back. Discovering custom via state practice, postulated as human practice, may be more of a process of "judgment" than that of scientific inquiry.[75] First, data management is daunting: how could one quantify the "amount, duration, frequency, and repetition" of a state practice in question in such precision as may be required in natural science?[76] Not many states collect and publish their official positions on a given international

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73. Joseph Raz, Ethics in the Public Domain: Essays in the Morality of the Law and Politics 210 (1994).

74. *See, e.g.*, Wolfke, *supra* note 8, at 60–61 (observing that we could not actually capture the very moment when a CIL rule begins to form and have a binding effect).

75. Alan Boyle & Christine Chinkin, The Making of International Law 279 (2007); Patricia W. Birnie & Alan E. Boyle, International Law and the Environment 16 (2d ed. 2002).

76. Roberts, *supra* note 17, at 784; *see* D'Amato, *supra* note 12, at 56–66 (providing a quantitative analysis of the four modalities of duration, repetition, continuity and generality for custom classification); Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 99 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2 1995) ("When attempting To ascertain State practice with a view to establishing the existence of a customary rule or a general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard, certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments.")

issue or policy in a systematic manner.[77] Thus, most state practices do not remain visible to outsiders and may require serious decoding or translation to be ready for empirical investigations.[78] Even if one may secure loads of official statements, they may not be general, consistent, and uncontroversial.[79] Multiple occurrences of similar languages in multiple statements of different countries would not automatically ascertain the existence of a regular pattern of state conducts on a given issue that would warrant the label of state practice. Converging vocabularies might not indicate converging views and practices.[80]

These methodological quandaries tend to undermine a positivist foundation in formulating state practice by identifying state conducts.[81] Locating state practice is inevitably a selective process that largely ignores omissions, vagueness, and contradictions in the raw data of state conducts.[82] As a prac-

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77. Michael Wood (Special Rapporteur on the Formation and Evidence of Customary International Law), *Second Report on Identification of Customary International Law*, ¶ 5, U.N. Doc. A/CN.4/672 (May 22, 2014).

78. Daniel Bethlehem, *The Secret Life of International Law*, 1 CAMBRIDGE J. INT'L & COMPAR. L. 23, 34 (2012).

79. *See* Kelly, *supra* note 16, at 471 (explaining that the Restatement (Third) of the Foreign Relations Law of the United States contains substantive norms and obligations but is not based on general and consistent state practice); Asylum (Colom./Peru), Judgment, 1950 I.C.J. 266, 277 (Nov. 20) (noting that there is "so much uncertainty and contradiction, so much fluctuation and discrepancy . . . so much inconsistency . . . and the practice has been so much influence by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule . . . .").

80. CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 221 (1983); *see also* Rudolf Bernhardt, *Custom and Treaty in the Law of the Sea*, *in* 205 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 247, 267 (1987) ("[V]erbal declarations cannot create customary rules if the real practice is different.").

81. *See* Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 3 (Feb. 5) (separate opinion by President Bustamante y Rivero) (highlighting the state practice's "sporadic nature [that] stands in the way of any systemization").

82. Roberts, *supra* note 17, at 761; Fidler, *supra* note 57, at 217; Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 537 (1993); *see also* Tullio Treves, *Customary International Law*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 28 (2012) (alerting "the ambiguities with which many elements of practice are fraught"); B. Graefrath, *The International Law Commission Tomorrow: Improving Its Organization and Methods of Work*, 85 AM. J. INT'L L. 595, 606 (1991) ("Today, State practice and legal activities have become so extensive and technical, and information is so voluminous and

tical matter, the International Court of Justice judges are not trained scientists and they are not mandated to elaborate the process of crystallization of state practice into a customary rule under Article 38 of the Statute of the International Court of Justice.[83] They usually assume the existence of CIL rules without particular efforts to (scientifically) substantiate it.[84] Judges' apparent delphic discovery of CIL[85] appears to have already been "theory-impregnated,"[86] in that such a discovery would be possible only *in terms of* a certain schemata or theory. To make intelligible what states are inclined to do when facing a civilian fishing vessel in times of war seems to learn a particular theorization of CIL authored by Judge Gray in *Paquete Habana*. CIL may not reflect a social reality extracted objectively from an ostensible regular pattern of state practice; instead, it might be a theory-generated verisimilitude.

A CIL rule regarding expropriation is a case in point. Provisions prescribing full compensation in times of expropriation are ubiquitous in bilateral investment treaties concluded by developed countries, especially by the United States. Would such repeated occurrences demonstrate the existence of CIL of full compensation in expropriation? Or, has such a CIL norm

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scattered."); Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. 3, 100 (July 25) (separate opinion by de Castro, J.) ("It is not easy to prove the existence of a general practice accepted as law."); Corfu Channel (U.K. v Alb.), Judgment, 1949 I.C.J. 4, 74 (Apr. 9) (dissenting opinion by Krylov, J.) ("The practice of States in this matter is far from uniform, and it is impossible to say that an international custom exists in regard to it.").

83. Alain Pellet, *Article 38*, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 731, 749 (Andreas Zimmermann et al. eds., 2d ed. 2012).

84. *See id.* at 750 ("In some cases, the Court has been content simply to postulate that a practice sustaining the norm exist[s], without taking pains to demonstrate it."); Alain Pellet, *Shaping the Future of International Law: The Role of the World Court in Law-Making*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN, 1065, 1076 (M. H. Arsanjani et al. eds. 2011) (highlighting the ICJ's prominent tendency to "assert" the existence of CIL, rather than to "prove" it).

85. *See* Maurice Mendelson, *The International Court of Justice and the Sources of International Law*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 63, 64 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) (discussing the ad hoc manner in which judges must occasionally decipher rules of international law).

86. *See* Peter Winch, *The Idea of Social Science*, *in* RATIONALITY 1, 15–16 (Bryan R. Wilson ed., 1970) (discussing the ways in which pre-existent legal frameworks shape the ways judges approach the law).

caused, and will continue to cause, similar occurrences? J. Patrick Kelly argues that advocates for this position of full compensation are inclined to select only those episodes corresponding to the theory.[87] However, as Oscar Schachter aptly observes, the mere repetition of certain clauses in bilateral investment treaties (BITs) does not automatically warrant general acceptance of a particular behavioral pattern as a legal obligation.[88] Another position or theory may contradict the full compensation theory. Other scholars and developing countries subscribe to the theory of the national treatment standard in times of expropriation that often does not meet the full compensation. They point to a number of lump-sum settlements as evidence of their own position or theory.[89] All in all, an epistemological division is responsible for such incoherency in constructing custom regarding the level of compensation in expropriation.[90]

Some scholars attempt to overcome such selection bias and restore rationalism's original scientific appeal by adding theoretical sophistication. Jack Goldsmith and Eric Posner focus on power pressure and convergence of self-interest in postulating

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87. Kelly, *supra* note 16, at 501–02; *see also* Brice M. Clagett, *Protection of Foreign Investment Under the Revised Restatement*, 25 VA. J. INT'L L. 73, 81–85 (1984) (discussing bilateral investment treaties and the status of existing provisions regarding compensation); Davis R. Robinson, *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176, 177 (1984) (arguing that the Restatement did not identify a clear rule of international law related to compensation).

88. Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121, 126 (1984).

89. *See* Kelly, *supra* note 16, at 502 (discussing diverging views of the US State Department and certain international law theorists with regards to questions raised by the issue of compensation); *see also* Brenard Kishoiyian, *The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 NW. J. INT'L L. & BUS. 327, 329 (1994) (discussing the impact of bilateral investment treaties on the issue of compensation); Georges Abi-Saab, *Permanent Sovereignty Over Natural Resources and Economic Activities*, *in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 597, 612 (Mohammed Bedjaoui ed., 1991) (contrasting Western standards of compensation with the "partial compensation" that occurred after many post-World War II nationalizations); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT'L. L. 639, 684–87 (1998) (likewise discussing the general effect of bilateral investment treaty regimes on guarantees of compensation).

90. *See also* Ernest A. Young, *The Story of* Banco Nacional de Cuba v. Sabbatino*: Federal Judicial Power in Foreign Relations Cases*, *in* FEDERAL COURTS STORIES 415, 429–32 (Vicki Jackson & Judith Resnik eds., 2009) (explaining why the *Sabbatino* court avoided invoking customary international law).

a coherent pattern in state practice.[91] Goldsmith and Posner's CIL game does not necessitate the existence of *opinio juris*.[92] To them, CIL is merely "aspirational" and states readily depart from a CIL rule in cases where their interests go against it.[93] George Norman and Joel Trachtman's multilateral CIL game model, dubbed "nuanced rationalism,"[94] goes beyond the conventional rationalist realm of inquiry and factors into what might be understood as *social* parameters, such as "the extent to which increasing the number of states involved increases the value of cooperation or the detriments of defection, including whether the particular issue has characteristics of a commons problem, a public good, or a network good."[95] They characterize *opinio juris* as a social-rational concept, or a collective disposition toward a rule of law manifested in social practice[96] and CIL as certain default rules that produce a stable equilibrium (order) among states.[97] Similarly, Pierre-Hugues Verdier and Erik Voeten attempt to overcome conventional rationalist theories on CIL by broadening the notion of reciprocity and embracing "shared legal understandings" of states.[98]

Nonetheless, these ostensibly social theories of CIL, despite their theoretical niceties, do not seem to escape from the rationalist limitations. Both models devised by Goldsmith and Posner, and Norman and Trachtman are still confined to a game theory whose tenets require jurists to collect behavioral data from states based on fixed preferences and payoff matrices, no matter how sophisticated they may be. According to game theorists, jurists' ultimate goal in this CIL game is to explore a causal mechanism between utilitarian incentives, such as power and

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91. Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. Chi. L. Rev. 1113, 1122–24

92. *Id.* at 1132 (dismissing the notion of *opinio juris*).

93. Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 Va. J Int'l L. 639, 658 (2000).

94. Norman & Trachtman, *supra* note 66, at 573.

95. *Id.* at 542.

96. *Id.* at 570.

97. *Id.* at 574.

98. Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 390 Am. J. Int'l L. 389, 417 (2014).

money, and the existence of, or compliance with, a CIL rule.[99] Along the same line, Verdier and Voeten locate a negative utility in the "precedential effects of defection" on the assumption that "it makes sense for states to be concerned with the precedential impact of their actions on a CIL rule only if they stand to benefit from continued compliance by others, and vice versa."[100] This rationalist approach risks undermining CIL rules because a state might be reluctant to identify custom if some states have already abandoned the underlying practice.[101] Or, even if a state does identify custom, it may still elect to defect and free ride on complying behaviors from other states.[102] In sum, from a sociological standpoint, rationalist calculation may be irrelevant in CIL compliance pull. On the contrary, from a rationalist standpoint, a payoff from compliance has already been *priced in* a complying behavior.

In reality, there is always a "split" between what is to be anticipated from a customary rule and what is to be perceived from a future case in a similar situation.[103] One could not locate in a custom a complete legal formula that would predict or determine each and every state action in the absence of "an infinite series of different hypothetical propositions."[104] Imputing *opinio juris* for a certain pattern of state conducts "is not a causal inference to an unwitnessed event but the subsumption of an episode proposition under a law-like proposition."[105]

Granted, even the classical understanding of international law based on state consent also tends to highlight the empirical element (*usus*) in forming CIL.[106] For example, the

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99. *Cf.* GUZMAN, *supra* note 67, at 121 ("Our basic rational choice assumptions imply that states will only enter into agreements when doing so makes them (or at least, their policy-makers) better off.").

100. Verdier & Voeten, *supra* note 98, at 391.

101. *Id.* at 390–91.

102. *Id.*; *see also* Jens David Ohlin, *Precedent and Custom: A Response to Verdier and Voeten*, 108 AJIL UNBOUND 246 (2014) (observing that states would fail to comply with CIL if states retain "an extremely high discount rate (and therefore prioritize present interest over future interests).").

103. *Cf.* ROBERT SOKOLOWSKI, PICTURES, QUOTATIONS, AND DISTINCTIONS: FOURTEEN ESSAYS IN PHENOMENOLOGY 67 (1992) (discussing the "urgence toward distinction" upon the recognition of "two concrete things" presented).

104. *Cf.* RYLE, *supra* note 20, at 32 (noting that infinite hypothetical propositions can be implied by describing a thing's disposition).

105. *Id.* at 87.

106. *See* Jason A. Beckett, *Behind Relative Normativity: Rules and Process as Prerequisites of Law*, 12 EUR. J. INT'L L. 627, 628–29 (2001) (defending classical

International Court of Justice defined CIL as "a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas."[107] Usually, those state practices concern certain thematic areas of state action, such as the treatment of foreign diplomats under the host country's criminal law system,[108] the treatment of civilian vessels of an adversary in war times,[109] and a sovereign country's right of self-defense in the face of an armed attack.[110] Since a tacit form of consent may be inferred from the existence of state practice, practice itself may justify the assumption that states have agreed to recognize a customary norm.[111] This inductive understanding of CIL[112] tends to marginalize the

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positivist methodology of public international law with some emphasis on empiricism); *see also* Nikki C. Gutierrez & Mitu Gulati, *Custom in Our Court: Reconciling Theory with Reality in the Debate about Erie Railroad and Customary International Law*, 27 DUKE J. COMPAR. & INT'L L. 243, 265 (2017) (observing that in the United States positivists argue for "incorporation" through the Constitution or federal statutes before a CIL rule becomes federal common law).

107. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. 246, ¶ 111 (Oct. 12).

108. *See, e.g.*, Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3 (Feb. 14) (exemplifying practical application of foreign diplomat customary international law).

109. *See* The Paquete Habana, 175 U.S. 677, 678 (1900) (exemplifying practical application of civilian vessel customary international law).

110. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 27 (June 27).

111. Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 83, 89 (Apr. 9) (dissenting opinion by Azevedo, J.); *see also* Peter E. Benson, *François Gény's Doctrine of Customary Law*, 20 CAN. Y.B. INT'L L. 267, 268 (1982) ("Custom is now understood in terms of the process of its creation, and this process is explained from the wholly internal and fully autonomous standpoint of the states which themselves bring into existence and recognize as binding, authoritative customary rules.").

112. *See* Roberts, *supra* note 17, at 758, 762 (clarifying the difference between inductive and deductive methods of justifying modern custom); *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, 1984 I.C.J. at 299 ("[The] presence [of customary rules] in the *opinio juris* of States can be tested by induction based on the analysis of a sufficiently extensive and convincing practice, and not by deduction from preconceived ideas."); *Arrest Warrant of 11 April 2000*, 2002 I.C.J. at 147 (dissenting opinion ad hoc Van den Wyngaert, J.) ("State practice concerning immunities of Heads of State does not, *per se*, apply to Foreign Ministers. There is no State practice evidencing an *opinio juris* on this point."); Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, *in* 159 COLLECTED COURSES OF THE HAGUE ACADEMY

other constitutive element of CIL, *opinio juris*.[113] Here, *opinio juris* has only a token identity as its concept is subsumed into that of state practice.

B. *Unpredictable International Custom*

The classical position is characteristic of a category mistake. How could an ideational concept, such as *opinio juris*, be induced from a physical object, such as state practice? A mere repetition of state conduct, no matter how regular, might not be necessary and sufficient to approve a normative value.[114] As David Hume once observed, "what is" should not be confused with "what ought to be."[115] If *opinio juris* is also a "thing" to be exhumed *separately* from state practice, which is a logical conclusion from dualism, we are confronted by the circularity conundrum or the "chronological paradox."[116] If state conduct and state mind are two different entities that collectively

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OF INTERNATIONAL LAW 24 (1979) ("A large amount of what is described as the material element of State practice contains in itself an implicit subjective element, an indication of *opinio juris*.").

113. *See Statement of Principles*, *supra* note 14, at 751 ("If there is a good deal of State practice, the need (if such there be) also to demonstrate the presence of the subjective element is likely to be dispensed with.").

114. *Cf.* Julia Tanner, *The Naturalistic Fallacy*, 13 RICH. J. PHIL., Autumn 2006, at 1 (explaining that certain concepts cannot be defined or represented as anything other than themselves). Regarding a notable view that it is not actually a logical fallacy, see generally W. K. Frankena, *The Naturalistic Fallacy*, 48 MIND 464 (1939).

115. DAVID HUME, TREATIES OF HUMAN NATURE, bk. III, pt. I, § I (Oxford, Clarendon Press 1739). From a different angle, Brian Lepard locates this "naturalistic fallacy" in the very concept of *opinio juris*. According to Lepard, a mere "belief" by some states that a custom *is* the law might not be a sufficient condition for its legally binding force (*ought to be*) in the future. Lepard attempts to solve this problem by redefining *opinio juris* as "a belief by states generally that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct." Brian D. Lepard, *Introduction* to REEXAMINING CUSTOMARY INTERNATIONAL LAW 1, 26 (Brian D. Lepard ed., 2017).

116. Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, *in* CUSTOM'S FUTURE 34, 40 (Curtis A. Bradley ed., 2016); *see also* MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 130–33 (1999) (introducing several unsatisfactory scholarly attempts to overcome the chronological paradox).

constitute a CIL rule, how would *opinio juris* ever emerge *before* a CIL rule is formed?[117]

We may manage to formulate a behavioral code via an international custom, which may reasonably forecast, in a stochastic sense, future behaviors of states. Still, we may not be able to understand what states were *actually* doing without the knowledge of their mindset.[118] Normativity of any sort requires an investigation into legal consciousness of rule-followers that pierces the veil of a revealed behavioral pattern. A single behavioral pattern, such as handing money to someone, is subject to more than one legal evaluation. While it could signify a voluntary donation, it might also reveal a forced financial transfer at gunpoint.[119]

Suppose that a state allows foreign vessels to enter its territorial sea to catch fish every Monday for no particular reason. This eccentric conduct was quickly mimicked by a neighboring state and then spread to other states, again for no particular reason. Now, one might witness a fairly reliable pattern of behavior among coastal states that allow foreign fishing vessels to catch fish in their territorial seas every Monday. Yet, could we call this predictive pattern a custom? Suppose that state X suddenly banned fishing ships from state Y from entering its territorial sea on Monday. Could state X claim that state Y violated international custom? State X might respond that it maintained such a regular behavioral pattern out of courtesy, not as

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117. Restatement (Third) of Foreign Rel. L. of the U.S., §102 reporter's note 2 (1987) ("[H]ow, it is asked, can there be a sense of legal obligation before the law from which the legal obligation derives has matured?").

118. *See* Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 388, 437 (2005) ("[W]e cannot automatically infer anything about State wills or beliefs — the presence or absence of custom — by looking at the State's external behaviour. The normative sense of behaviour can be determined only once we first know the 'internal aspect' — that is, how the State itself understands its conduct . . . doctrine about customary law is indeterminate because circular. It assumes behaviour to be evidence of the *opinio juris* and the latter to be evidence of which behaviour is relevant as custom.").

119. This is an "internal" aspect of law that H.L.A. Hart emphatically pointed out. "A social rule has an "internal" aspect . . . . What is necessary is that there should be a critical reflective attitude to certain patterns of behavior as a common standard and that this should display itself in criticism (including self-criticism), demands for conformity and in the acknowledgements that such criticism and demands are justified." H.L.A. Hart, The Concept of Law 56–57 (2d ed. 1994).

a fulfillment of any international law obligation.[120] After all, CIL needs the "philosophers' stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules."[121]

This is a starkly different realm of inquiry from the external dimension of CIL. Here, states do not merely react to external forces but act informed by a "distinct class of reasons,"[122] such as *opinio juris*. If a behavioral pattern forms a custom, it must be shared and sustained by certain cognitive criteria of approval and disapproval, derived from the "feelings of embarrassment, anxiety, and guilt and shame that a [state] suffers at the prospect of violating them."[123] Only then, we may distinguish between *law* and *non-law*[124] or between a violation of a preexisting customary rule and a mere departure from the past courtesy.[125] Take inaction for example. Two seemingly identical state behaviors are subject to two diametrically opposite evaluations under international law, depending on the existence of *opinio juris*. Most states often refrain from launching criminal proceedings against foreign officials on an extraterritorial

120. *Cf.* Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, 305–06 (Dec. 20) (separate opinion by Petrén, J.) ("[Refraining from a conduct must be] motivated not by political or economic considerations but by a conviction . . . [that certain conduct is] prohibited by customary international law . . . ."); HART, *supra* note 118, at 55–56 (distinguishing habits from rules).

121. H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 47 (1972).

122. Jules L. Coleman, *The Architecture of Jurisprudence*, 121 YALE L.J. 2, 78 (2011).

123. Jon Elster, *Social Norms and Economic Theory*, 3 J. ECON. PERSP. 99, 100 (1989); *see also* RICHARD J. BERNSTEIN, THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY 40 (1976) (discussing "appraising value judgement" that "expresses approval or disapproval").

124. *See* North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20) ("There are many international acts, e.g. in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty."); Asylum (Colom./Peru), Judgment, 1950 I.C.J 266, 285–86 (Nov. 20) (observing that asylum might be recognized not as complying with a customary rule but from mere political considerations); Right of Passage over Indian Territory (Port. v. India), Judgment, 1957 I.C.J. 125, 177 (Nov. 26) (dissenting opinion by Chagla, J.) (recognizing that a certain practice could be maintained *ex gratia*).

125. *See* MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 48 (Kluwer L. Int'l 2d ed. 1997) (explaining that *opinio juris* is the basis for distinguishing between practices that are "law, or mere usage or comity, or even accidental").

basis. One might be tempted to extrapolate the existence of a negative state practice from this regular pattern of omission. However, this ostensible practice might or might not derive from legal reasons. Mere absence of opposition or acquiescence would not necessarily mean a tacit agreement on the practice.[126] Avoiding an extraterritorial prosecution of foreign officials might just come from political considerations.[127] Thus, only an adequate inquiry into a cognitive dimension will eventually determine the existence of CIL, such as the immunity of foreign officials from criminal proceedings.

Even if induction from *usus* to *opinio* is somehow possible, as claimed by the majority opinion in *Paquete Habana*, *usus* might not be empirically general enough for accurate inference. An allegedly general practice could become contestable in a different context. For example, some Western diplomatic practices, which mostly emerged from culturally homogenous states in the post-Westphalian Europe, might have looked general enough to base certain CIL rules.[128] Likewise, one might observe that it was Western nations with large fleets that devised the freedom of the high seas in a strategic effort to serve their

126. Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law*, 30 BRIT. Y.B. INT'L L. 1, 33 (1953).

127. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 147 (Feb. 14) (dissenting opinion by Van den Wyngaert, J.) ("It is noteworthy that the International Law Commission's Special Rapporteur on Jurisdictional Immunities of States and their Property . . . expressed the view that privileges and immunities enjoyed by Foreign Ministers are granted on the basis of comity rather than on the basis of established rules of international law.").

128. *See* Kelly, *supra* note 16, at 459–60 (observing that "[t]here is no common legal culture; rather the international community has a wide variety of cultural values and interests"); *see also* HENRY WHEATON, WHEATON'S ELEMENTS OF INTERNATIONAL LAW 14 (Coleman Phillipson ed., 5th ed. 1916) (maintaining that international law "has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin"); Rein Müllerson, *The Interplay of Objective and Subjective Elements in Customary Law*, *in* INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY 161, 162 (Karel Wellens ed., 1998) ("[I]n many . . . areas of international relations only a few states may have such practice or states may become involved in 'actual' practice only occasionally."); Oscar Schachter, *New Custom: Power,* Opinio Juris *and Contrary Practice*, *in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY 531, 536 (Jerzy Makarczyk ed., 1996) ("As a historical fact, the great body of customary international law was made by remarkably few States.").

own geopolitical and commercial interests.[129] In this regard, the traditional CIL rules might be said to largely reflect the geopolitical interests of the Western nations at the expense of non-Western nations.[130] Note that unlike the traditional Western perception of adequate compensation from expropriation, Latin American countries have long held the position that foreign investors must not be treated more favorably than their own nationals.[131]

In sum, the existence of CIL does not signify that states will always do a certain thing in a particular situation; rather, states are *likely* to behave in a certain way in that situation.[132] It is this kind of proclivity that jurists mostly ascribe to when they invoke predictability of future state behaviors compliant with CIL.[133]

However, such ex ante proclivity may be undermined by certain unknown, and unknowable, conditions. CIL rules may predict future state actions with a caveat of *ceteris paribus* ("other things being equal").[134] States operate in an "open" system in

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129. *See* MOHAMED BEDJAOUI, TOWARD A NEW INTERNATIONAL ECONOMIC ORDER 136 (1979).

130. *See* Chimni, *supra* note 25 (describing a colonialist legacy embedded in CIL and calling for the incorporation of the Third World perspective into the modern usage of CIL); *see also* Kelly, *supra* note 16, at 469, 519 (observing that "[b]are practice among some Western nations appears to be sufficient" to constitute new rules of CIL, and that "much of CIL is determined by the academic and judicial elites or by the practices of a minority of states . . . ."); Roberts, *supra* note 17, at 768 ("New, developing, and socialist states have objected to customs as having been created by wealthy European and imperialist powers."); Charney, *supra* note 82, at 537 ("[W]hen authorities examine the evidence necessary to establish customary law, they consider actions of a limited number of states, often only the largest, most prominent, or most interested among them.").

131. *See, e.g.*, GREEN HAYWOOD HACKWORTH, 3 DIGEST OF INTERNATIONAL LAW 655–661 (1942) (recounting correspondence during the 1930s between the Mexican Ambassador in Washington and the U.S. Secretary of State surrounding the issue of compensation for foreign investor expropriation, including in comparison to nationals).

132. *Cf.* RYLE, *supra* note 20, at 100 (noting that "describ[ing] and explain[ing] people's behaviour signif[ies] dispositions and not episodes").

133. *See* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. Y.B. INT'L L. 82, 88–89 (1988) (observing that rules of customary law "allow reasonably reliable *predictions* as to future State behavior") (emphasis added)).

134. *Cf.* EDWARD HALLETT CARR, WHAT IS HISTORY? 68 (R. W. Davies ed., 2d ed. 1987) ("The so-called laws of sciences which affect our ordinary life are in fact statements of tendency, statements of what will happen other things being equal. They do not claim to predict what will happen in concrete cases.").

which not all variables could be controlled.[135] The existence of CIL itself is no guarantee of compliance *in all times* since there might be so many potential intervening events that would effectively deter full compliance with CIL. If we want to obtain the level of prediction akin to natural science, we must suppress agency of states to the extent that we comfortably assume that states will behave as if they were robots following algorithms. Yet, the moment you admit that state actors do adapt and do not just reproduce norms, such a prediction suddenly looks shaky. CIL has inherent ambiguity that strict scientism fails to account for. It is essentially an interpretive matter and natural science cannot simply replace moral and legal controversies.

C. *Moralistic International Custom*

Up until the end of the Second World War, CIL had concerned, nearly exclusively, state-to-state (*inter*-national) relationships, such as territorial sovereignty, diplomatic immunity, and maritime engagement (the law of the sea). Yet, the unprecedented atrocities of the Second World War brought the concept of "human" into the mainstream of CIL. These modern "Grotian moments" have triggered the postwar rise of *new* types of CIL rules.[136] Now, international law has begun to look like *a moral code* because of its "emphatic understanding" or "value-commitment"[137] in the terms of justice and morality.[138] Thus, human rights CIL is distinct from non-human rights CIL, which

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135. *See generally* Roy Bhaskar, A Realist Theory of Science 118–26 (1975) (detailing the practical differences between closed-system theorization and the unpredictability of open-system application).

136. M. P. Scharf, *Seizing the Grotian Moment: Accelerated Formation of Customary International Law in times of Fundamental Change*, 43 Cornell Int'l L.J. 439, 450, 467–68 (2010).

137. Wilson, *supra* note 65, at xii.

138. *Compare* Tasioulas, *supra* note 17 (critiquing the positivism and pragmatism of Prosper Weil in favor of relative normativity as a path toward more progressive world order values), *and* Jan Wouters & Cedric Ryngaert, *Impact on the Process of the Formation of Customary International Law*, *in* The Impact of Human Rights Law on General International Law 111, 119–20 (Menno T. Kamminga & Martin Scheinin eds. 2009) ("The classical positivist approach may . . . pose serious difficulties for the legal protection and promotion of human rights."), *with* Beckett, *supra* note 106, at 628–29 (defending classical positivist approach with agreed aims of coexistence and cooperation in the international system).

relies conceptually on an inquiry into actual state conducts.[139] All of a sudden, *opinio* has begun to take the central seat of *usus* in identifying CIL rules in these new areas of international human rights and humanitarian law. Rather than derived from thematic state conducts, *opinio juris* seems to constitute those conducts in a rather universal fashion, driven by a strong moral impetus.[140] A certain prior normative thesis appears to drive the international court's recognition of CIL.[141] For example, the international court may presuppose an ideal status of international "community"[142] consisting of civilized nations as the epitome of reason.[143] Such idealism tends to suppress any possible sovereign rejection of a putative CIL rule. Logically, peremptory norms of general international law (*jus cogens*) entertain no "persistent objector."[144] A logical connection, not empirical investigation, builds CIL rules in these areas of *jus cogens*: *opinio necessitatis* replaces *opinio juris.*[145]

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139. Wouters & Ryngaert, *supra* note 138, at 111– 29 ("It is often argued, especially by human rights-oriented lawyers, that the method of customary law formation in the field of human rights and international humanitarian law is structurally different from the traditional method of customary law formation in public international law . . . . Classical methods of law formation based on state consent and extensive and uniform state practice may be relaxed somewhat if 'the stakes are high' . . . .").

140. Guénaël Mettraux, International Crimes and the Ad Hoc Tribunals 18 (2006) (observing that recent decisions by international criminal courts have demonstrated a shift "away from a practice-oriented sort of custom to a more specifically *humanitarian* interpretation of the customary process").

141. Rein Müllerson, *On the Nature and Scope of Customary International Law*, 2 Austrian Rev. Int'l & Eur. L. 341, 353–54 (1997).

142. *See, e.g.*, Charles De Visscher, Theory and Reality in Public International Law 155 (Percy Ellwood Corbett trans., 1957) ("What gives international custom its special value and its superiority over conventional institutions, is the fact that, developing by spontaneous practice, it reflects a deeply felt *community* of law.") (emphasis added).

143. *See, e.g.*, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (refereeing to the "conscience of mankind").

144. Roberts, *supra* note 17, at 784; Byers, *supra* note 115, at 183–86.

145. *See* Frontier Dispute (Burk. Faso/Mali), Judgment, 1986 I.C.J. 554, ¶ 20 (Dec. 22) ("[T]he principle of *uti possidetis* . . . is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs."). *See also* Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 527 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) ("*opinio necessitatis*, crystallizing as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law").

Here, natural law represented by moral theory[146] or "international consensus,"[147] offers an existential foundation of CIL. Even an ostensibly positivist element of "tacit consent" behind CIL tends to claim a broader historical meaning in its etymological sense, such as accordance and unanimity, than a narrow, specific state consent.[148] Thus, identifying a CIL rule is rather deductive in essence:[149] abstract *opinio* justifies concrete *usus*.[150] International law scholars or judges of international courts may selectively exploit state practice in order to justify morally informed customary norm.[151] They tend to winnow out raw data, such as the General Assembly Resolutions, based on their

146. *See generally* Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1169, 1188 (2015) (elaborating on the notion that laws make claims to one's moral obligations); Coleman, *supra* note 121, at 22 (presenting the idea that "there is an underlying moral theory that is implicit in the existence of law").

147. *See* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1853–54 (1998) (describing the process of judges construing international law in consensus as one of little discretion and more akin to discovery).

148. Kadens & Young, *supra* note 28, at 889–90.

149. Simma & Alston, *supra* note 132, at 89 ("The process of customary law-making is thus turned into a self-contained exercise in rhetoric. The approach now used is *deductive*."); Roberts, *supra* note 17, at 758, 763; Bin Cheng, *Custom: The Future of General State Practice In a Divided World*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 513, 530 (Ronald St. John Macdonald & Douglas Johnston eds., 1983) ("In law, these psychological elements need not correspond to reality. They are simply what, in lawyers' logic, are deductible from what has been said or done.").

150. Prosecutor v. Kaing, Case No. 001/18-07-2007-ECCC/SC, Appeal Judgment, ¶ 93 (Extraordinary Chambers in the Cts. of Cambodia Feb. 3, 2012), https://www.legal-tools.org/doc/681bad/ ("[I]n evaluating the emergence of a principle or general rule concerning conduct that offends the laws of humanity . . . the requirement of *opinio juris* may take pre-eminence over the *usus* element of custom."); Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 527 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) ("[P]rinciples of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallizing as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.").

151. Wouters & Ryngaert, *supra* note 139, at 130. In a similar vein, Fernando Tesón warns against "fake custom" that certain norm entrepreneurs may claim as CIL when it is not law under any legitimate theories. Fernando Tesón, *Fake*

moral preferences.[152] They may even equate *opinio juris* with preexisting customary rules and regard state practice merely as "expressive" of such rules.[153] This way, practice appears to be mobilized to create a novel norm, rather than to represent a preexisting one.[154] Also, it is practically difficult to locate positive evidence of state practice regarding most international human rights since such practice is manifested by "abstentions from violations," not by affirmative conducts.[155] Therefore, the International Court of Justice takes a more lenient approach in recognizing custom rules in the human rights-related field without rigorous scrutiny of the evidence of state practice.[156]

This moral theory-impregnated formation of CIL may overdetermine the existence of actual state practice for the following reasons. First, the prevalence of *opinio juris* inferred from its obvious ideal may overcome the scarce or even inconsistent existence of state practice, and therefore help such imperfect practice achieve the status of CIL.[157] Second, such position, due

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Custom, *in* Reexamining Customary International Law 86, 86 (Brian D. Lepard ed. 2017).

152. Beckett, *supra* note 106, at 633; John Finnis, Natural Law and Natural Rights 241–43 (1982).

153. Continental Shelf (Tunis./Libyan Arab Jamahiriya), Judgment, 1982 I.C.J. 18, ¶ 43 (Feb. 24); *cf.* John Tasioulas, *Comment: Opinio Juris and the Genesis of Custom: A Solution to the Paradox*, 26 Austl. Y.B. Int'l L. 199, 203 (2007) (linking the general normativity of international custom to a "broader, systematic ethical commitment").

154. Louis Henkin, International Law: Politics and Values 37 (1995).

155. Theodor Meron, The Making of International Criminal Justice: A View from the Bench: Selected Speeches 32 (2011).

156. *Id.* at 31.

157. *See* Frederic Kirgis, *Custom on a Sliding Scale*, 81 Am. J. Int'l L. 146, 149–51 (1987) (positing that the elements of custom exist on a curve or "sliding scale" between axes of *opinion juris* and state practice); Tasioulas, *supra* note 17, at 113 ("The sliding scale conception permits the adoption of an interpretation . . . even though it fares poorly on the dimension of fit . . ."); Beckett, *supra* note 106, at 631-32 (accepting the "sliding scale" concept but attributing cases of high *opinio juris* to "raw data" instead of moral popularity); Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 527 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) ("[P]rinciples of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallizing as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.").

to its "rush to champion new rules of law,"[158] tends to pay relatively little attention to potential objections.[159] Third, controversies or even breaches of customs would not undermine their underlying normative integrity.[160]

In this regard, these human rights CIL rules, mostly in the form of *jus cogens*, are subject to a positivist critique, especially regarding its universal nature of *opinio juris*. Prosper Weil spearheaded such critique as he questioned the authentic existence of state consent in the formation of certain human rights CIL rules. According to Weil, this paradigm shift in *opinio juris* from merely "conventional" to "universal"[161] represents a "vague personification of the international community."[162] Weil problematized this universalist *opinio juris* as an "ill-defined majority consent," a "vague consensus,"[163] or "illusions heightened by deceptive rhetoric."[164] To Weil, *jus cogens* might border on a "myth" as it lacks a firm positivist foundation.[165]

The competing topics of international custom, non-human rights CIL and human rights CIL, correspond largely to its competing motifs, one based on actual state practice and the other relying on moral reason, respectively. Here, two different

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158. Fidler, *supra* note 57, at 224; *see also* Villiger, *supra* note 124, at 19 (highlighting fears that abstract statements of government officials may turn into customary rules).

159. Tasioulas, *supra* note 153, at 200–02; Steven Wheatley, The Democratic Legitimacy of International Law 150 (2010) (arguing that since non-state actors such as judges and scholars assume the task of identifying and applying rules of customary law, positions of states, especially positions of those states that would be negatively affected by such rules, are hardly taken into account).

160. *See* Ian Brownlie, International Law and the Use of Force by States 111 (1963) (arguing that "controversy" and lack of "general agreement" as to States' obligations surrounding aggression did not preclude the existence of "a rule of customary law").

161. Prosper Weil, *Towards Relative Normativity of International Law?*, 77 Am. J. Int'l L. 413, 438–39 (1983).

162. *Id.* at 426.

163. *Id.* at 438.

164. *Id.* at 442; *see also* Jörg Kammerhofer, *Orthodox Generalists and Political Activists in International Legal Scholarship*, *in* International Law in a Multipolar World 152, 157 (Matthew Happold ed., 2012) (criticizing that "activist scholars fudge the law to further goals which are not expressed as positive international law").

165. N. C. H. Dunbar, *The Myth of Customary International Law*, 8 Austl. Y.B. Int'l L. 1, 8 (1983) ("The myth is in assuming that universal state practice *ipso facto* creates law.").

international legal realities manifest through CIL. On the one hand, a post-Westphalian, *Lotus*-type anarchical space in which sovereign states, as rational actors, interact with one another in a universal and predictable fashion. Their behaviors, both cooperative and conflictual, may be explained by either interest or utility. Thus, not to jail foreign envoys would benefit both states concerned in a repeated diplomatic game. Here, CIL may be said to serve a certain functional goal.[166] On the other hand, a different conceptual space has emerged in the international sphere since the end of the Second World War. A tragic collective memory of atrocities has formed a global culture of human rights, offering "right answers" for a "just world order."[167] While there is nothing logically inevitable in this history, it was against this historical background that the "dynamo" of human rights[168] has come to the forefront as a critical part of the postwar international legal reality. Importantly, these two different modes of non-human rights CIL and human rights CIL, which denote two different ontologies of CIL, *usus* versus *opinio*, have emerged against two different historical milieus, prewar versus postwar.

These two international legal realities projected by two different modes of CIL are two different *sub*-realties, or dimensions, that collectively constitute a bigger, holistic reality of international law and relations. The problem is that these two different legal realties are likely to compete without giving each other due regard, as if one could replace the other. To the extent that international jurists' attention is fixated on a non-human rights CIL rule, they tend to focus on state conduct in identifying putative CIL rules. Likewise, if international jurists face a situation in which they locate a human rights CIL rule, they tend to distill such rule from state mind, not by observation but by interpretation.

As an internal, subjective concept inaccessible from the outside,[169] *opinio juris* may only be *inferred* from the same repository of data as state conducts, such as diplomatic exchanges and public statements by government officials. Yet, the

166. *See* Roberts, *supra* note 17, at 764 (discussing the "facilitative" content of custom).

167. Simma & Alston, *supra* note 132, at 83.

168. Fidler, *supra* note 57, at 220.

169. Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EUR. J. INT'L L. 305, 325 (1993).

persuasive command that an imputation provides is essentially "complex and frail,"[170] which makes the concept of *opinio juris* incoherent.[171] For example, what if positions adopted by three branches of a government regarding a certain state conduct diverge? After all, identifying *opinio juris* requires bracketing the "crudities" that characterize all of the practical social relations.[172] Furthermore, identifying *opinio juris* tends to become more complicated when observed for an extended period of time. For example, in the first century since its foundation, the United States maintained its *opinio juris* regarding the restraint of extraterritorial application of its domestic statute. The Unites States Supreme Court had opined that it was one of the law of nations.[173] Subsequently, however, the Court departed from its original position and asserted that the same practice was of "comity,"[174] deliberately denying its legally binding nature.

Nonetheless, the real challenges faced by *opinio juris* appear to be of an ontological nature. It is *opinio juris* that creates a new social reality around a particular thematic social institution, or custom. A *legal* reality is a special mode of social reality. A legal reality concerning a particular CIL rule is characterized by an enhanced, binding, level of normative consciousness on appropriate behavioral patterns. Therefore, *opinio juris* carries out an emphatic, meaning-giving mission that would "summon behavior as much as to explain it."[175] For example, genocide does not simply explain legal consequences, such as state responsibility, when one ethnic group intentionally and systematically decimates another ethnic group; it is rather a *meaning* behind the concept of genocide that regulates state and human actions in times of societal conflicts.[176]

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170. Tanney, *Rethinking Ryle*, *supra* note 61, at xv.

171. Fastenrath, *supra* note 169, at 326.

172. *Cf.* Winch, *supra* note 86, at 10 (noting that, with regard to relations between "flesh-and-blood men," considering them "in a formal systematic way is to think at a very high level of abstraction, at which all the anomalies, imperfections and crudities which characterize men's actual intercourse with each other in society have been removed").

173. The Schooner Exch. v. McFaddon, 11 U.S. 116, 123 (1812).

174. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

175. Wilson, *supra* note 65, at xi.

176. *Cf.* Winch, *supra* note 86, at 9–11 (explaining that it is an event or word's use in human social relations that imbues it with a "meaning" or "character").

In sum, Cartesian dualism forces CIL to pay a philosophical price of category mistake. Under this philosophical error, state conduct and state mind are regarded, wrongly, as separable, commensurable, and therefore mutually substitutable. Consequently, conceptual competition between the two dimensions is likely to consolidate their initial antinomies and distort a true legal reality of CIL by either oversimplifying or exaggerating its limited dimension, be it material or ideal. In other words, a reality projected by state mind unduly suppresses another reality projected by state practice, and vice versa. Naturally, suppressing, and thus distorting, a holistic reality of CIL invites opprobrium from those who refuse to tolerate such a partial reality.

IV. Toward the Holistic Law of Nations

A. *Past Attempts to Reconcile the Tension between State Conduct and State Mind*

As discussed above, anthropomorphism rooted deeply in public international law is destined to suffer the Cartesian dualism in identifying international custom. It is such dualism that generates a category mistake between these two constitutive elements both ontologically and methodologically. The traditional approach, which largely prioritizes state conduct (*usus*) over state mind (*opinio*), appears to be unsustainable, given its methodological proclivity to positivism. There is no "ghost" in state mind whose impulse always causes a particular pattern of state conduct like the law of physics.[177] Yet, the modern approach, which largely prioritizes state mind (*opinio*) over state conduct (*usus*), invites harsh criticism from sovereign nations, especially from the South. To some critics, international custom "has become the carpet under which any unidentified act or rule is swept, often with ensuing conviction that because the carpet now covers it, it must be valid 'law.'"[178] The "identity crisis"[179] of international custom triggered by this acerbic divide over its nature exposes itself to the margin of obsolescence.[180]

177. Hofstadter, *supra* note 21, at 260–61.

178. Ingrid Detter De Lupis, The Concept of International Law 116 (1987).

179. Simma & Alston, *supra* note 132, at 88.

180. *See* Goldsmith & Posner, *supra* note 93, at 640–41, 672 (arguing that both the traditional and the modern approach to custom are merely

This is also a crisis of public international law generally in that international custom is one of its cardinal sources under Article 38 of the Statute of the International Court of Justice. In response, several scholars have attempted to reconcile the tension between state conduct and state mind.

John Tasioulas attempts to overcome dualism by reconciling opposing dimensions of state practice and *opinio juris*[181] by combining Frederick Kirgis' "sliding scale" thesis of CIL[182] and Ronald Dworkin's interpretive legal theory embodied by "fit and substance."[183] Kirgis postulates that "very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, as long as it is not negated by evidence of non-normative intent."[184] Kirgis further articulates, "[a]s the frequency and consistency of [state] practice decline in any series of cases, a stronger showing of an *opinio juris* is required."[185] In the other extreme, "a clearly demonstrated *opinio juris* established a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule."[186] Tasioulas offers a formula by which to identify a CIL rule in a given situation, depending on the relative salience of either constituent. One CIL rule may be comprised of thirty percent state practice and seventy percent *opinio juris*, while another rule seventy percent state practice and thirty percent *opinio juris*. This sliding scale also carries with it other methodological and philosophical traits corresponding to each constituent, i.e., induction versus deduction as well as legal positivism and legal

"aspirational"); Kelly, *supra* note 16, at 500 (critically observing that elements of custom provide "empty vessels in which to pour one's own normative theory of international law").

181. Tasioulas, *supra* note 17, at 27–32.

182. Kirgis, *supra* note 157, at 149 ("On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an *opinio juris* is required. At the other end of the scale, a clearly demonstrated *opinio juris* establishes a customary rule without much (or any) affirmative showing [of state practice].").

183. Ronald Dworkin, Law's Empire 257 (1986) [hereinafter Dworkin, Law's Empire]; Ronald Dworkin, *Law as Interpretation*, 60 Tex. L. Rev. 527, 528 (1982).

184. Kirgis, *supra* note 157, at 149.

185. *Id.*

186. *Id.*

naturalism.[187] Thus, if raw data of state conduct supports ("fits") the primary threshold of general regularity (practice), such an interpretation holds.[188] Only in hard cases, a moral or political inquiry ("substance") is necessary to determine the existence of CIL.[189]

Tasioulas's approach pursues a radical "synthesis" of the two constituents, rather than their "mutually epistemic legibility."[190] Tasioulas accepts Kirgis's thesis that two constituents are mutually substitutable in a conceptual sense. Thus, according to Tasioulas's thesis, state practice (fit) and *opinio juris* (substance) must be "balanced against each other" in case of possible multiple interpretations.[191] Likewise, the prominence of one constituent may compensate deficiencies in the other.[192] Here, the original anthropomorphic sin of Cartesian dualism remains unresolved. For example, a descriptive nature of state practice and a normative nature of *opinio juris* are mutually competing and leave analytical cacophonies.

At the same time, this Dworkinian interpretive approach raises a new, perhaps more serious, question than it was originally meant to resolve. Who identifies CIL? States themselves or international jurists whose judicial legislation is akin to a chain novel writing process?[193] According to Tasioulas, it is a Herculean

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187. *See* Goldsmith & Posner, *supra* note 93, at 640 (observing that the jurisprudence of customary international law appears to alternate every two hundred years or so between naturalism and positivism).

188. DWORKIN, LAW'S EMPIRE, *supra* note 183, at 255; Roberts, *supra* note 17, at 771.

189. DWORKIN, LAW'S EMPIRE, *supra* note 183, at 256; Roberts, *supra* note 17, at 771.

190. *See* Susan Hoeber Rudolph, *Toward Convergence*, IN PROBLEMS AND METHODS IN THE STUDY OF POLITICS 388 (Ian Shapiro et al. eds., 2004) (describing exchange of vocabulary between epistemologies as representing "mutual epistemic legibility, but no community of modes of inquiry"); *see also* Vincent Pouliot, *"Sobjectivism": Toward a Constructivist Methodology*, 51 INT'L STUD. Q. 359, 378 (2007) (citing Susan Hoeber Rudolph, *Toward Convergence, in* PROBLEMS AND METHODS IN THE STUDY OF POLITICS (Ian Shapiro et al. eds., 2004)) (describing possibilities for the enhancement of "mutual epistemic legibility" in the realm of international relations).

191. Roberts, *supra* note 17, at 771; *accord* John Finnis, *On Reason and Authority in Law's Empire*, 6 LAW & PHIL. 357, 374 (1987).

192. Roberts, *supra* note 17, at 773.

193. *See* DWORKIN, LAW'S EMPIRE, *supra* note 183, at 228–32 (introducing the concept of international jurists interpreting previous writing and adding chapters to a "chain novel" jurisprudence).

judge who is always capable of identifying a CIL rule as a *right* answer. Likewise, Kirgis also acknowledges that International Court of Justice judges often postulate the existence of certain CIL rules, such as the non-intervention principle and fundamental human rights, from abstract legal documents without discussing corresponding state practice.[194] Similarly, whose morality should an interpreter apply to the dimension of substance? States' morality or that of an interpreter or jurist? By the same token, who decides whether a given case is easy or hard? Also, how would an interpreter—be it a jurist or a state itself— decide whether a given case is easy or hard? An easy case to one interpreter might be a hard case to another.

Anthea Roberts appears to follow the same model as she envisions an ideal interpreter who can perfectly balance between practice (fit) and principles (substance), thereby ultimately reaching a reflective equilibrium.[195] Yet, this judicial legislation model of CIL raises a non-trivial paradox: unless a court adjudicates a case, there is no way for a CIL rule to exist. This model logically dismisses a situation in which a CIL rule "emerges" in a non-litigious context and states themselves act upon it without a hermeneutic intervention from jurists.

Anthea Roberts attempts to offer a better balancing mechanism between two constituents than Tasioulas by blending Dworkin's interpretive theory with John Rawl's theory of "reflective equilibrium."[196] First, Roberts, like Tasioulas, adheres to the Dworkinian synthesis between two ostensibly incommensurable elements, descriptive exactitude (fit) and normative merit (substance).[197] Then, Roberts aims to reach an ideal balancing point between fit and substance, or, "coherence," by a practical deliberation model (reflective equilibrium) provided by John Rawls.[198]

Roberts rightly acknowledges that it is eventually a hermeneutic task that integrates "description," which denotes Dworkian fit and Rawlsian practice, and "normativity," which represents Dworkian substance and Rawlsian principles. Roberts highlights subjectivism that inheres in the Dworkinian

194. Kirgis, *supra* note 157, at 147.

195. Roberts, *supra* note 17, at 781 (applying the dynamic "reflective equilibrium" approach).

196. *Id.*, at 774–78.

197. *Id.*, at 779.

198. *Id.*; JOHN RAWLS, A THEORY OF JUSTICE 19–20 (1972).

dichotomy of fit and substance.[199] Nonetheless, her model is still based on dualism between state conduct and state mind, which is prone to the consequent category mistake. According to Roberts's thesis, one constituent eventually prevails over the other and does not seem to escape the original dichotomy between apology and utopia that she criticizes. After all, the destiny of a CIL rule will eventually depend on either constituent since "a reflective equilibrium will lean toward the *stronger* value."[200] For example, in cases of human rights custom, such as the prohibition of torture, the normative constituent (*opinio juris*) that represents *lex ferenda* drives the most coherent interpretation toward the existence of CIL.[201] At the other end of the spectrum, a facilitative, non-human rights custom, such as the rule of ships passing on the left, tends to gain its legality based on a survey of corresponding state conducts.[202] Curiously, Roberts is more agnostic in identifying CIL rules in the *middle* of the spectrum, such as international environmental custom, as she admits that those rules may be "contentious and open to change."[203]

B. *Synthesizing State Conduct and State Mind: A Re-Conceptualization*

Previous attempts to reconcile the tension between state conduct and state mind have not been entirely satisfying, although they offer many valuable lessons on the nature of challenges brought by the old and new concepts of CIL. Against this background, this Article seeks to overcome the ontological and methodological rift by presenting a holistic thesis on international custom, drawing on relevant philosophical and sociological insights. The first step toward this endeavor is to restore the conceptual unity of international custom. Judging by the difficulty of distinguishing between the two constituent elements, *usus* and *opinio*, they may never have meant to be

199. Roberts, *supra* note 16, at 781.

200. *Id.* at 789 (emphasis added); *accord* Roberts, *supra* note 17, at 783 ("*Strong* substantive considerations may compensate for a relatively weak fit.") (emphasis added).

201. *Id.* at 781.

202. *Id.* at 781–82.

203. *Id.* at 782.

separated.[204] State conducts are material *parts* comprising a CIL norm, yet it is *opinio juris* that unifies those parts via a normative foundation and therefore constitute a *whole* (CIL).[205] From this holistic perspective, one can interpret Article 38 of the Statute of International Court of Justice (a "general practice accepted as law")[206] in a way which the Article never treats *usus* and *opinio* as isolated conceptual elements. Previous jurists bifurcated this originally unified concept solely for a heuristic reason. Yet, heuristic cannot be a replacement for the true reality it is supposed to represent. Therefore, this Article aims to restore a synthesis between these two constitutive elements.

Reinstating an ontological unity of international custom requires a new philosophical formulation immune from the original sin of the Cartesian dualism. The Cartesian dualism is "substance" dualism, which treats mind and body as two different things. This type of dualism is prone to a category mistake in that mind translates into a thinking thing (*res cogitans*), which is detachable from the bodily operation. Thus, the Cartesian dualism treats both elements as separable *parts*, which might be simplified as P (*usus*) + OJ (*opinio*) = C (custom rule).[207] According to this formula, state practice might exist independently from *opinio juris* (P = C – OJ), and vice versa (OJ = C –P). As a logical corollary, evidence for a relevant practice must not be used for *opinio juris*: separate pieces of evidence, be it an action or a statement, must be adduced to substantiate

204. *See Statement of Principles*, *supra* note 14, at 718 ("It is in fact often difficult or even impossible to disentangle the two elements."); Martti Koskenniemi, *Theory: Implications for the Practitioner*, *in* THEORY AND INTERNATIONAL LAW: AN INTRODUCTION 3, 15 (1991) ("In legal practice, there exists no way to ascertain the presence or absence of the subjective element which would be separate from the ascertainment of the existence of consistent conforming behaviour.").

205. *See* MARVIN FARBER, THE FOUNDATION OF PHENOMENOLOGY: EDMUND HUSSERL AND THE QUEST FOR A RIGOROUS SCIENCE OF PHILOSOPHY 306 (1943) (explaining that "the unity of independent objects" occurs in "foundation" and that "[n]othing real . . . exists beyond the totality of the portions of the whole").

206. Statute of the International Court of Justice art. 38, ¶ 1, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

207. This discussion on parts (abstracta) and wholes (concreta) draws largely on phenomenological (Husserlian) insights. *See* ROBERT SOKOLOWSKI, HUSSERLIAN MEDITATIONS 8–17 (1974) (providing that parts become a whole when certain presences persist while other presences turn into absences).

the existence of practice and *opinio juris*, respectively.[208] While innocuous sounding purely in a theoretical sense, this position remains dubious in a practical manner. In particular, it is silent as to why a certain state habit (P) never invites *opinio juris* (OJ) and thus remains incapable of ripening into a CIL rule (C – OJ).[209] Likewise, it also fails to elucidate why another state habit (P*) indeed induces *opinio juris* and therefore eventually forms a CIL rule (P* [OJ]). Or, if a behavioral pattern of states is likely to evolve from a mere habit (P) to a custom-constituting practice (P*),[210] exactly when is this juris-generative turning point (P → P*)?

Here, phenomenological insights can articulate the ontological totality of international custom comprised of the two constituents. A CIL rule is a whole to which both *usus* and *opinio* are parts. Both of them are inseparable parts ("moments"), not separable parts ("pieces").[211] According to this understanding, *opinio* is not another set of operations paralleling *usus*; rather, it is a collective tendency of states to behave in a certain way and do certain things.[212] Mental states concern what they *do*,

208. Michael Wood (Special Rapporteur on the Formation and Evidence of Customary International Law), *Third Report on Identification of Customary International Law*, 6 n.25, U.N. Doc. A/CN.4/682 (Mar. 27, 2015) [hereinafter Wood, *Third Report*] ("States consider that a rule of customary law exists."); *see also* Maurice Mendelson, *The Formation of Customary International Law*, *in* 272 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 155, 206–07 (1998) ("What must, however, be avoided is counting the same act as an instance of both the subjective and the objective element."). *But see* Michael Wood (Special Rapporteur on the Formation and Evidence of Customary International Law), *Fourth Report on Identification of Customary International Law*, 14 n.31, U.N. Doc. A/CN.4/695 (Mar. 8, 2016) (suggesting that "the requirement for a separate inquiry for each of the two constituent elements of customary international law does not exclude the possibility that, in some cases, the same material may be used to ascertain both practice and acceptance as law (*opinio juris*)").

209. According to the theory of norm "life cycle," certain state habits that preliminarily acquired "a critical mass of actors" may nonetheless fail to reach a "tipping point." Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 891–93 (1998).

210. *See* The Paquete Habana, 175 U.S. 677, 708 (1900) (providing that a customary rule may be evinced from precedent, consent of nations, and "mutual convenience").

211. *Cf.* Müllerson, *supra* note 141, at 345 (observing that these two elements are "really inseparable; one does not exist without the other").

212. *See* Hofstadter, *supra* note 21, at 257 (explaining Ryle's thesis as one in which internal mind dynamics of humans are not separate from the mere "tendencies and abilities to do certain sorts of things").

rather than what they are made of.[213] Although we can speak of abstract moments, such as *usus* and *opinio*, and make a distinction between them by the faculty of language ("can be isolated in thought and in speech"),[214] neither can become a concrete whole, such as a CIL rule, by itself.

For example, a mere set of multiple state conducts is not so much custom-minus (P = C – OJ) as an independent social fact *qua* a whole by itself. This particular set of social facts (P), in the absence of a background legal community (*nomos*), might never evolve into a customary rule (P* [OJ]) even though repeated infinitely.[215] It is qualitatively, not quantitatively, different from a set of state conducts observable under a CIL rule (P ≠ P*). Note that these two distinct social facts (P and P*) might exhibit the *same* behavioral pattern. For example, in *Paquete Habana*, both the majority opinion and the dissent would allow Cuban civilian fishing vessels to go unscathed even in times of war. Here, the latter situation (P) denotes mere comity or *ex gratia*, while the former (P*) denotes *authority*.[216] Thus, some behavioral pattern (P) among states, no matter how regular it has been, might not

213. This position is called "functionalism" in philosophy of mind. *See generally* Ruth Garrett Millikan, *In Defense of Proper Functions*, 56 PHIL. SCI. 288 (1989) (defending a recursive definition of "proper function"); Robert Van Gulick, *Functionalism as a Theory of Mind*, 8 PHIL. RSCH. ARCHIVES 185 (1983) (offering a broad characterization of functionalist theories of mind and issues within them); Robert C. Richardson, *Functionalism and Reductionism*, 46 PHIL. SCI. 533 (1979) (arguing for the consistency of classic reductionism and functionalist theory); Robert Cummins, *Functional Analysis*, 72 J. PHIL. 741 (1975) (critiquing underlying assumptions of functional analysis and characterization); Larry Wright, *Functions*, 82 PHIL. REV. 139 (1973) (delving into a philosophical analysis of "functions").

214. SOKOLOWSKI, *supra* note 207, at 12.

215. North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3, ¶ 77 (Feb. 20) ("The frequency, or even habitual character of the acts is not in itself enough."); Prosecutor v. Nuon, Case No. 002/19-09-2007-ECCC/OCIJ, Decision on the Appeals against the Co-Investigating Judges Order on Joint Criminal Enterprise, ¶ 53 (Extraordinary Chambers in the Cts. of Cambodia May 20, 2010), https://www.legal-tools.org/doc/320587/ ("A wealth of State practice does not usually carry with it a presumption that *opinio juris* exists.").

216. The Paquete Habana, 175 U.S. 677, 719 (1900) (Fuller, J., dissenting) ("In truth, the exemption of fishing craft is essentially an *act of grace*, and not a matter of right, and it is extended or denied as the exigency is believed to demand.") (emphasis added); *see also* WENGER, *supra* note 23, at 77 (discussing communities of joint practice and the mutual engagement found therein).

emerge as a peculiar set of state practice that carries conspicuous legal DNAs with it.

Nonetheless, scholars often refer only to a moment (*abstractum*), *usus* or *opinio*, without elucidating its association with a whole (*concretum*), or a customary rule. It thus generates a false impression ("singularism") that a part (*usus* or *opinio*) is a whole (customary rule) by itself. This speaks to a category mistake since singularism is based on the premise that *usus* and *opinio* are somewhat commensurable or interchangeable. Under this category mistake, as discussed above, *usus* reifies *opinio* and vice versa.[217] This is the fundamental reason behind the circularity that remains an enigma of CIL. Without *opinio juris*, no regular practice could be formed and without iterated practice, no *opinio juris* might be formed. Since singularism entertains no conceptual primacy of each part (moment), one can be exposed only by bracketing the other. Hence the ontological competition between the two constituent factors occurs, as discussed above.

Then, given the ontological unity of CIL, how would the two constituents be interrelated? One possibility of interrelation is to acknowledge a material relation to mind, while still rejecting a reductionist relationship to body.[218] In other words, a given CIL rule just holds two distinct characteristics (*usus* and *opinio*), while still maintaining a holistic ontological status.[219] According to this position, mental states do imply materially manifested order, which is constituted by relations among various facts or events.[220] Still, *opinio juris* just remains a general proclivity to

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217. In this line, Jack Goldsmith and Eric Posner observe that: "The idea of *opinio juris* is mysterious because the legal obligation is created by a state's belief in the existence of the legal obligation. *Opinio juris* is really a conclusion about a practice's status as international law; it does not explain how a widespread and uniform practice becomes law." GOLDSMITH & POSNER, *supra* note 66, at 24.

218. For more on this philosophical position, called "property dualism," see generally *Physicalism, Reductive and Nonreductive*, ENCYC. SCI. & RELIGION (Sept. 22, 2021), https://www.encyclopedia.com/education/encyclopedias-almanacs-transcripts-and-maps/physicalism-reductive-and-nonreductive.

219. *See generally* Tanney, *Rethinking Ryle*, *supra* note 61, at x (calling attention to issues with "finding a place for the mental in the physical world").

220. *Cf.* Ryle, *supra* note 20, at 160 ("[W]hen we speak of a person's mind, we are not speaking of a second theatre of special status incidents, but of certain ways in which some of the incidents of his one life are ordered.").

accept an identifiable behavioral pattern as legally binding.[221] Rather than a ghost in the machine that always causes states to conform to a CIL rule, states are simply bound to behave in that way. In this regard, *opinio juris* is a way of configuring a particular pattern of state behaviors as a rule by imposing upon the pattern an inferential power. Then, why in some situations, would a regular pattern of state behaviors fail to instantiate *opinio juris*, thereby never manifesting itself as a CIL rule? While state mind is neither identical with nor reduced to state conduct, the former still depends ("supervenes") on the latter. Importantly, *opinio juris* is "multiple realizable"[222] through different sets of state conducts, varying in time and space, as "a vast mosaic of local matters of fact."[223] There might be a thousand different sets of government policies and statements—official and unofficial or recorded or unrecorded— that could demonstrate each state's *opinio juris* regarding a particular customary rule.[224]

Suppose that there have been a hundred episodes (E1 to E100) in which relevant state behaviors share similar material properties, such as letting go of civilian fishing vessels carrying an adversary's national flag in a time of a war. One state might locate *opinio juris* from one set of episodes (from E1 to E50), while another state might do so from another set of episodes (from E30 to E80). Thus, both states might deduce the existence of the same *opinio juris* from different sets of material

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221. Indeed, this abstract proclivity is a hallmark of public international law. "[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time." Louis Henkin, How Nations Behave 47 (2d ed. 1979).

222. *See generally* Lawrence A. Shapiro, *Multiple Realizations*, 97 J. Phil. 635 (2000) (arguing that multiple realization theory is more difficult to establish than others believe); *see also* Jerry Fodor, *The Disunity of Science as a Working Hypothesis*, 28 Synthese 97, 97 (1974) (challenging the claim that all "psychological theories must reduce to physical theories"); Hilary Putnam, *Philosophy of Our Mental Life*, *in* Mind Language and Reality 291, 291 (1975) (challenging the reduction of mentality down to the issue of "matter or soul").

223. David K. Lewis, The Plurality of Worlds at ix–x (1986).

224. *Cf.* Ryle, *supra* note 20, at 32 ("When Jane Austen wished to show the specific kind of pride which characterised the heroine of 'Pride and Prejudice,' she had to represent her actions, words, thoughts and feelings in a thousand different situations. There is no standard type of action or reaction such that Jane Austen could say 'My heroine's kind of pride was just the tendency to do this, whenever a situation of that sort arose.'")

facts.[225] As conceptual construction, rather than empirical verification, multiple paths leading to the same culture, as exhibited by *opinio juris*, may exist. Here, one can say that similar institutional, or community, qualities that inform regular behavioral patterns lead to the same state mind, that is *opinio juris*.[226] Yet, as discussed above, different sets of state conducts (P and P*) instantiate different cognitive statuses in state mind, such as comity and *opinio juris*.[227]

C. *"Legal Community" (Nomos) as a Theoretical Venue for Unity*

Overcoming the Cartesian dualism in international custom begins with unifying state conduct and state mind. These two constitutive elements can be understood as two different dimensions or properties of a *whole* (CIL). In this regard, certain sociological insights offer a vital conceptual support for the unity between state conduct and state mind. One of the most crucial premises held by the new social model is that *opinio juris* does not represent a private, subjective state of mind, nor its simple aggregation.[228] *Opinio juris* as a particular cognitive status in state mind remains public and collective,[229] distinguished

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225. *See, e.g.*, Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 99 (June 27) ("This *opinio juris* may, thought with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions . . . .").

226. *See* Donald Davidson, *Mental Events*, *in* THE PHILOSOPHY OF MIND: CLASSICAL PROBLEMS/CONTEMPORARY ISSUES 137, 141 (Brian Beakley & Peter Ludlow eds., 1992) ("[M]ental characteristics are in some sense dependent, or supervenient, on physical characteristics. Such supervenience might be taken to mean that there cannot be two events alike in all physical respects but differing in some mental respect, or that an object cannot alter in some mental respect without altering in some physical respect.").

227. Regarding such supervenience of mental properties (such as opinio juris) on physical properties (such as state conduct), see notably Donald Davidson, *Law and Cause*, 49 DIALECTICA 263, 266 (1995).

228. *See* Judith Goldstein & Robert O. Keohane, *Ideas and Foreign Policy: An Analytical Framework*, *in* IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 3–8 (Judith Goldstein & Robert O. Keohane eds., 1993) (observing that ideas, as well as material interests, shape behavior and noting the impact of beliefs shared by large numbers of people, such as world views).

229. *Cf.* Ryle, *supra* note 20, at 50 ("It is being maintained throughout this book that when we characterise people by mental predicates, we are not making untestable inferences to any ghostly processes occurring in streams of

from other states' cognitive statuses, such as courtesy or political expediency, which may remain private and dispositive. Rule-following in general is a social act executed within the context of "collective person," not as an individual person.[230] It is a group intent or collective intentionality that corresponds to a particular *nomos* among states,[231] constituted by a particular set of history, contingencies, and narratives. This social concept is distinct from individual psychological reasons, even though the latter, such as a strategic motivation, may entail the same physical event. Indeed, a solipsistic subjectivity, as insinuated by a Cartesian ghost in the machine, might be "irrelevant" in identifying *opinio juris*.[232]

From a sociological perspective, one can articulate the formation of CIL, which connotes both material and cognitive dimensions, in a dialectic process of "externalization, objectivation and internalization."[233] It is an intersubjective process of role-playing and reciprocal typification that characterizes a "legal community" (*nomos*).[234] Suppose that some states repeatedly condemn torture, and another state observes this. Such observation may have that observing state typify other states as torture-condemners. Then, that observing state will soon "inwardly appropriate" the observed states' repeated roles (torture-condemners) and model their own behaviors in accordance with such roles. Such roles, beyond being merely mimicked as such by the initial observation, "constitute" the observing state's future behaviors. A collection of these

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consciousness which we are debarred from visiting: we are describing the ways in which these people conduct parts of their predominantly *public* behavior.") (emphasis added); *see also* G. M. Danilenko, Law-Making in the International Community 102–07 (1993) (distinguishing between an "individual" *opinio juris* and "coordinated or general" *opinio juris*).

230. *See generally* Max Scheler, Formalism in Ethics and a Non-Formal Ethics of Value (Manfred S. Frings & Roger L. Funk trans., 1973) (introducing the "collective person," describing mutual responsibilities that individuals have within collective persons).

231. *See* John Gerard Ruggie, *What Makes the World Hang Together?: Neo-Utilitarianism and the Social Constructivist Challenge*, 52 Int'l Org. 855, 869–70 (1998) (describing beliefs held by collectives, intersubjectively).

232. *Cf.* MacIntyre, *supra* note 58, at 124 (critiquing the viewpoint that reasons behind agents are neither relevant nor accessible).

233. Peter L. Berger & Thomas Luckmann, The Social Construction of Reality: A Treatise in the Sociology of Knowledge 129 (1966).

234. *Id.* at 56–57.

"reciprocally typified actions"[235] may be institutionalized in a form of doctrine or rule—i.e., international custom. This sociological notion of role-playing helps us overcome the categorical mistakes between state conduct and state mind in that it mediates between an external legal reality materially manifested through state conducts and an internalized legal reality cognitively structured by state mind.[236]

Markedly, a legal community is thematic in that state members of a particular legal community share a particular situation in which they need to work out a common solution.[237] At the stage of externalization, states often coordinate their different expectations by learning from each other's behaviors. In the aforementioned example, torture-observers constitute their future actions based on new expectations generated by learning from torture-condemners. Here, these states "act as resources to each other"[238] by "making [their] minds available to one another."[239] Importantly, the formation of CIL is not spontaneous, it is subject to a dynamic process.[240] Then, a nascent form of international custom is objectivized as a primordial "organizational code." The seed (code) of a CIL rule subsequently adapts to refined knowledge and beliefs among community members regarding situational logic and behavioral propriety, and is further crystalized into a stable format of norm.[241] In this sense, *opinio juris* is an ultimately institutionalized, that is to say *legalized*, form of "social proof" that is capable of emanating

235. *Id.* at 56–57.

236. *Id.* at 79.

237. Jeremy Waldron, *Authority for Officials*, *in* RIGHTS, CULTURE AND THE LAW: THEMES FROM THE LEGAL AND POLITICAL PHILOSOPHY OF JOSEPH RAZ 45, 46 (Lukas H. Meyer et al. eds. 2003).

238. WENGER, *supra* note 23, at 47.

239. John McDowell, *Wittgenstein on Following a Rule*, 58 SYNTHESE 325, 350 (1984).

240. Approaching CIL as an "institution," from a sociological sense, rather than a stand-alone norm, warrants such a dynamic and constitutive nature of the CIL formation. *See* Finnemore & Sikkink, *supra* note 209, at 891 ("[T]he norm isolates single standards of behavior, whereas institutions emphasize the way in which behavioral rules are structured together and interrelate.").

241. Admittedly, a state ("persistent objector") may object to this crystallization process and thus refuse to recognize a certain practice as a CIL rule. Wood, *Third Report*, *supra* note 208, at 59–66.

"feelings of embarrassment, anxiety, guilt, and shame that a person suffers at the prospect of violating [CIL rules]."[242]

This objectivated CIL rule in turn penetrates individual beliefs, thereby socializing states into adopting the code.[243] A state "simultaneously externalizes [its] own being into the social world and internalizes it as an objective reality."[244] Once formed intersubjectively, *opinio juris* as an objective social reality is "retrojected" into a stream of a subjective reality of an individual state during socialization.[245] Often, this socialization is tacit and taken for granted. In this regard, CIL as a social product may be deemed a language, as a CIL rule "becomes something [states] can point to, refer to, strive for, appeal to, and use or misuse in arguments."[246] Its validity criteria is not whether it is axiomatically accurate, but whether it is shared and accepted, implicitly if not explicitly, within a given community.[247] Indeed, the International Court of Justice has already recognized such social trait of state mind in the name of "collective juridical conscience [that] respond[s] to the social necessities of States organized as a community."[248] This community framework can effectively address the "Achilles heel of consensualist outlook"[249] within international custom as an authority-bestowing

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242. Robert Axelrod, *An Evolutionary Approach to Norms*, 80 Am. Pol. Sci. Rev. 1095, 1105 (1986).

243. *Cf.* James G. March, *Exploration and Exploitation in Organizational Learning*, 2 Org. Sci. 71, 74–75 (1991) (detailing a model of mutual learning through code-adaptation in organizations).

244. Berger & Luckmann, *supra* note 233, at 129.

245. *Cf. id.* at 61 (describing the process through which humans come to produce institutions and the rest of their social world). Regarding a notable exception, see generally Robert Wolfe, *See you in Geneva! Legal (Mis-) Representations of the Trading System*, 11 Eur. J. Int'l Rels. 339 (2005) (observing that dense interactions within the SPS Committee tend to function better in enhancing WTO members' understanding of, and thus compliance with, the SPS Agreement than adjudicated decisions which are often confusing and incomprehensible).

246. Wenger, *supra* note 23, at 61.

247. *See* Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 Am. J. Socio. 406, 410–11 (1999) (suggesting that concepts of rationality are socially constructed under nonmarket factors such as social norms).

248. Legality of Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 13 (July 8) (declaration by President Bedjaoui) (emphasis added).

249. Weil, *supra* note 161, at 433.

international community offers the conceptual foundation of authentic customariness.[250]

Figure 1: The Conventional (Left) and the New Social Model (Right)

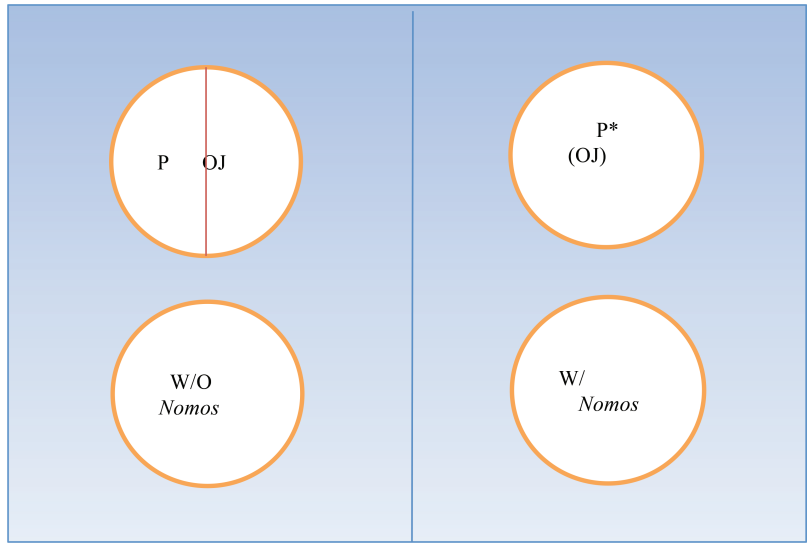

Figure 1 illustrates the new social model of CIL this Article advances. According to the conventional Cartesian model, CIL (C) is comprised of two separate elements of state conduct (P) and state mind (OJ). Hence, C = P + OJ. Due to the mutually competitive nature of these two constituent elements, P is likely to subsume OJ (in cases of the titular "traditional" custom) or OJ is inclined to subsume P (in cases of the titular "modern" custom). The conventional model seldom envisions a subject-specific legal community (*nomos*) in which a CIL rule emerges and becomes socialized through an intersubjective process within a particular spatial-temporal context. In contrast, the new social model employs *duality*, not dualism, of CIL. A special set of state

250. *See* Kelly, *supra* note 15, at 461–62 (considering internalized customary laws developed with the conviction of a community as authoritative and legitimate); IAN HAMNETT, CHIEFTAINSHIP AND LEGITIMACY: AN ANTHROPOLOGICAL STUDY OF EXECUTIVE LAW IN LESOTHO 14 (1975) (describing customary law derived by "actors in a social situation" as being essentially social and legitimate).

conducts (P*), nurtured under a thematic *nomos*, and therefore acquiring legal socialization, embodies state mind (OJ) within it. Here, P* and OJ are two conceptually discernible, yet operationally inseparable instantiations of the same whole (C).

D. *Symbolic Universe as the Origin of International Custom*

Under this legal community (*nomos*) framework, one can envision three ideal types of symbolic universe,[251] corresponding to three distinct modes of legal realities comprised of narratives, discourses, symbols, and myths, within a given association of states. These three ideal types represent different social conditions that construct unique state interests, preferences, identities, and behavioral patterns.[252] They are different modes of "institutional rationality," which may be defined as a "culturally and historically contingent form of consciousness."[253] The quality of a given thematic community shapes a unique dynamic by which a particular CIL rule emerges and has itself observed.[254] Three ideal types of symbolic universe,

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251. These ideal types denote "qualia," which is a philosophical term referring to "distinctive subjective character" or "introspectively accessible, phenomenal" aspects of mental lives. Michael Tye, *Qualia*, STAN. ENCYC. PHIL. *(Aug. 20, 2015)*, https://plato.stanford.edu/archives/win2016/entries/qualia/; *see generally* Michael Tye, *The Subjective Qualities of Mind*, 95 MIND 1 (1986) (describing qualia as subjective phenomenal qualities); Robert Van Gulick, *Functionalism and Qualia*, *in* THE BLACKWELL COMPANION TO CONSCIOUSNESS (Max Velmans & Susan Schneider eds., 2007) (referring to qualia as felt sensory aspects of experience). I draw these three ideal types (qualia) from Alexander Wendt's categorization of mental status. *See* WENDT, *supra* note 33, at 250 (outlining three "pathways" of norm internalization: "force," "price," and "legitimacy").

252. *See* CHRISTIAN REUS-SMIT, THE MORAL PURPOSE OF THE STATE: CULTURE, SOCIAL IDENTITY, AND INSTITUTIONAL RATIONALITY IN INTERNATIONAL RELATIONS 159 (1999) (considering even sovereignty as a basic ordering principle to be justified through these "higher-order values"). The Bourdieuvian notion of "habitus" may further illustrate the meaning of qualia that this article employs. *See generally* PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE (1977). *See also* Curtis A. Bradley, *A State Preferences Account of Customary International Law Adjudication*, (Duke L. Scholarship Repository, Working Paper, 2014), https://scholarship.law.duke.edu/faculty_scholarship/3376/ (observing that adjudicators' application of CIL may be understood as an effort to locate "state preferences" in state practice).

253. REUS-SMIT, *supra* note 252, at 161.

254. *Cf.* North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3, 175–76, 178 (Feb. 20) (dissenting opinion by Tanaka, J.)

depending on the depth of socialization and the density of institutionalization, inform three different sets of both material and ideational community traits.

First, simple "joint" affiliation among states, without deep social bond, may characterize a given legal community. This association of states, with a loose social bond among them, appears more of a marriage of convenience than of a trust-based community. Non-human rights CIL may fall within this rubric. Various strategic considerations in international cooperation, particularly in areas such as the law of the sea and the diplomatic immunity, tend to render the formation of these CIL rules relatively precarious. For example, the lack of conforming practice by "specially affected states" may prevent a putative CIL rule from emerging at all.[255] Even if a CIL rule does emerge, an exit option may be available to the titular "persistent objectors."[256] Such exit options may be crystalized as reservations when these types of CIL rules are subsequently codified as treaties, as seen in the United Nations Convention on the Law of the Sea (UNCLOS).[257] Under these circumstances, the thematic legal community cannot but remain relatively unstable and fragile.

Second, a stronger social bond than mere joint affiliation may form a "collective" structure. An institutional presence of certain collective agency, as seen in the United Nations, tends to facilitate the formation of an aspirational community among

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("In short, the process of generation of a customary law is relative in its manner according to the different fields of law, as I have indicated above. The time factor, namely the duration of custom, is relative; the same with factor of number, namely State practice. Not only must each factor generating a customary law be appraised according to the occasion and circumstances, but the formation as a whole must be considered as an organic and dynamic process.").

255. *North Sea Continental Shelf*, 1969 I.C.J. ¶ 74; *see generally* Kevin Jon Heller, *Specially-Affected States and the Formation of Custom*, 112 AM. J. INT'L L. 191 (2018) (explaining the qualifications for a "specially affected" state and the relevance of such designation); Shelly Aviv Yeini, *The Specially-Affecting States Doctrine*, 112 AM. J. INT'L L. 244 (2018) (discussing issues with the "specially affected" status particular to international humanitarian law).

256. *Cf.* Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 259 (2000) (viewing that more institutional density native to the collective political life tends to make an exit option infeasible).

257. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

states in an issue-specific area, such as genocide. Shared history or collective memory from wars and conflicts, in the form of common suffering, warrants community traits, such as a strong willingness among states to cooperate as "plural subjects."[258] Major human rights CIL, such as *jus cogens*, and international humanitarian law may fall within this category.[259] The universal nature of the topic allows even non-state actors, such as non-governmental organizations (NGOs), to play a role in the creation of custom.[260] When these types of CIL rules are codified as treaties, reservations may not be allowed, as seen in the Rome Statute of the International Criminal Court.[261]

Yet, the ostensible universality of *jus cogens* may ironically weaken its normativity as CIL rules remain unarticulated and therefore rather vague. While conceptually plausible, this universality may ignite political controversies when states cannot agree on the scope and level of such universality, as criticized by Prosper Weil.[262] Moreover, its universality is often confused with certain interstitial norms, such as general principles of law.[263] For example, *jus cogens* appears to have acquired the status of "well-ingrained practice"[264] whose generality obviates the need for empirical proof. This universality parallels the "general principles of law recognized by civilized nations."[265] Nonetheless,

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258. *See generally* MARGARET GILBERT, ON SOCIAL FACTS (1989) (arguing that when people share actions, beliefs, attitudes, or other attributes, they do so in a "plural subject" collectivity).

259. *See generally* Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55 (1966) (emphasizing the moral foundation (*bonos mores*) of *jus cogens* and its indispensable nature).

260. *See* Isabelle R. Gunning, *Modernizing Customary International Law: The Challenge of Human Rights*, 31 VA. J. INT'L L. 211, 212–13, 234 (1991) (noting that a modernized version of customary international law should include the voices of non-state actors).

261. Rome Statute of the International Criminal Court art. 120, July 17, 1998, 2187 U.N.T.S. 90.

262. Weil, *supra* note 161, at 437–38.

263. The I.C.J. often blurs the distinction between two sources (customary international law and general principles of law) by referring to obscure language such as "well-recognized rule [or principle] of international law." Mendelson, *supra* note 85, at 63–64.

264. FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS 252 (1989).

265. Statute of the International Court of Justice art. 38, ¶ 1(c), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

these modes of CIL rules usually obtain another normative layer by being codified into treaties. Codification may remedy, albeit not completely, the original normative ambiguity embedded in these types of CIL rules.[266]

Third, a legal community may be shaped by "corporate" structure characterized by supranational hierarchy. While a collective association of states features a stronger social bond than a joint association of states, the latter still lacks a centralized organization structure. For example, international human rights communities under the auspices of the United Nations remain diffuse and ambiguous in their operational structures, despite an apparent moral appeal. In contrast, certain international organizations, such as the WTO, retain sophisticated customary practice that provide various normative guides to its members. These international organizations may be regarded as a type of "superorganism."[267] A shared, common practice (*acquis communautaire*) emerges and is preserved as collective memories in these international organizations. Such institutional practice based on the corporate mentality guides and shapes individual members' behaviors.[268] José Alvarez's seminal thesis of "international organizations as law-makers" sheds crucial light on this new notion of customary norm by elucidating a rich, yet peculiar legal dynamic within a particular international organization.[269] As Alvarez aptly observes, this type of customary norm, such as the WTO case law, emerges endogenously from members' participation in a given legal community

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266. *See* Larissa van den Herik, *The Decline of Customary International Law as a Source of International Criminal Law*, *in* CUSTOM'S FUTURE 230, 251 (Curtis A. Bradley ed., 2016) (arguing that the codification and maturation of international criminal law into treaties tend to render CIL less significant in a practical manner). *But see* Laurence R. Helfer & Timothy Meyer, *The Evolution of Codification: A Principle-Agent Theory of the International Law Commission's Influence*, *in* CUSTOM'S FUTURE 305, 305–06, 327–29 (Curtis A. Bradley ed., 2016) (observing that the current political impasse in the UN General Assembly militates against the codification movement and instead pushes the ILC to boost its normative influence by other means, such as the current project on the identification of CIL).

267. WENDT, *supra* note 33, at 309–311.

268. *Cf.* Curtis A. Bradley, *Introduction* to CUSTOM'S FUTURE 1, 1–2 (Curtis A. Bradley ed., 2016) (observing that the increasingly prominent use of "soft law" by states tends to obscure the conventional distinction between nonbinding norms and CIL).

269. JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 40 (2005).

(*nomos*). It not only constrains but also enables members' behavioural choices.[270]

The following table epitomizes three ideal types of symbolic universe that characterize three representative legal communities that exhibit different community traits, both material and cognitive.

Table 1: Three Ideal Types of Symbolic Universe

	Social Bond	Culture; Identity	Community Traits	Formally Binding?	Examples
Joint	Moderate	Associate	Weak	Yes, but Fragile (Persistent Objector)	The Law of the Sea
Collective	Strong	Fellow	Strong yet Diffused	Yes, often Peremptory (*Jus Cogens*)	Int'l Human Rights
Corporate	Hierarchical	Member	Strong and Dense	No	The WTO Case Law

270. José E. Alvarez, *International Organizations: Then and Now*, Am. J. Int'l L. 100, 324, 338. Nonetheless, this organizational custom must not be understood as a hidden avenue in which international organizations *directly* create CIL. For example, Kristina Daugirdas argues that certain international organizations hold "implied powers" to formulate CIL rules due to their autonomous legal personality. She views that such legal personality enables international organizations to regulate relations between states and international organizations and among international organizations as well as to serve as "functional equivalents" to states. Kristina Daugirdas, *International Organizations and the Creation of Customary International Law*, 31 Eur. J. Int'l L. 207, 215–27 (2020). While this Article underscores international organizations' role in creating a more flexible type of custom, it is agnostic to the view that international organizations may directly create the conventional *hard* custom. International organizations' role in directly creating CIL remains controversial among states as it tends to undermine a positivist foundation of international law, as admitted by Daugirdas, *supra* at 227–29.

V. Conclusion

This Article attributes both conceptual and practical dilemmas in identifying CIL to its concealed philosophical foundation, the Cartesian mind-body dualism. It is dualism that forces the two constituent factors— state conduct and state mind—to separate from and compete with each other, eventually making one subsume the other. Consequently, confusions persist and tend to undermine the normative integrity of CIL. In response, this Article endeavors to reformulate CIL as a special type of social norm that emerges within a thematic legal community of states, and guides, if not directly causes, the actions transpiring in that community.

Under this social thesis, CIL is defined in a dialectical interaction between the two elements. In a given legal community, each CIL rule undergoes a normative life-cycle: rule-formation (externalization), rule-recognition (objectivation) and rule-following (internalization).[271] In this process, a particular set of conduct that has potential to develop into a customary rule is constituted by a shared *belief* in its legal reality, and such a practice, once performed, in turn further consolidates the original belief.[272] Unlike a treaty, no sharp separation exists between rule-formation and rule-following, as the latter (compliance) is a default pattern enmeshed with the former. In the *Paquete Habana* situation, while a long Western tradition of leaving civilian ships unscathed in times of war nurtured the common consent of mankind, it was such collective state mind that had guided individual state conduct in accordance with the law of nations. A nation would not seize civilian vessels of an adversary state in times of war since the nation knows, as a social fact, that it is prohibited from doing so. In turn, this particular type of behavioral pattern (self-restraint) in a particular social situation (war) performed by that state or others, further consolidates the original knowledge of the existence of such rule. ("Do not capture civilian vessels even in times of war.")

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271. Here, I draw on Berger & Luckmann, *supra* note 233, at 61–62, 129.

272. "Legal reality" is a special type of social reality that constitutes a social actor's (such as a state) evaluation of its environment. Social actors are subject to a strong sense of cognitive dissonance when they face a situation in which an objective reality at hand is inconsistent with the legal reality, thereby forcing them to modify their attitudes or behaviors. *See generally* Alice H. Eagly & Shelly Chaiken, The Psychology of Attitudes (1993).

Such a socio-holistic approach to CIL also illuminates why it appears so elusive for the conventional dualism to reconcile both elements at the same time, despite various attempts by scholars.[273] It is because the "duality," not dualism, of the two elements, tends to instantiate two distinct legal realities, as if light cannot be observed both as a particle and as a wave simultaneously. In a social field, state practice and state mind are nothing but two different manifestations of the same social phenomenon—the emergence and observance of a strong, that is *legal*, custom. It is just that a CIL rule is instantiated only through one element at one time that it brackets the other in doing so. Sometimes, state practice represents custom, and other times, state mind projects custom. To be more precise, our methodology, or attitude, in locating a CIL rule determines the eventual manner of instantiation. For example, the so-called "traditional" custom rules tend to prioritize empirics (*usus*) in an inductive manner, while the so-called "modern" custom rules intuition (*opinio*) in a deductive manner.[274]

In closing, this Article proposes that the future of CIL depart from its classical obsession with the *source* thesis centering on its formal legality. This Article highlights CIL's broader normative implications informed by its social foundations, including the possibility of a more elastic notion of customary norm. This international legal pluralism can harness a hidden normative gravitational force field within a particular international organization. This international organization-based custom can engender useful knowledge on each organization's distinct unique normative structure and members' overall expectation toward each other's action.

273. *See* discussion *supra* Part I.

274. *See* William Thomas Worster, *The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches*, 45 GEO. J. INT'L L. 445, 447 (2014) (observing that while a traditional approach is largely inductive and a modern approach deductive, they often overlap and this entails a "mixed methodology").