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Finding International Law: Rethinking the Doctrine of Sources

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Finding International Law: Rethinking the Doctrine of Sources

Harlan Grant Cohen*

ABSTRACT: The doctrine of sources has served international law well over the past century, providing structure and coherence during a time when international law was expanding rapidly and dramatically. But the doctrine's explanatory power is increasingly being challenged. Current doctrine tells us that treaties are international law; empirical evidence, however, suggests that treaties are poor predictors of state practice. The expansion of the international community, the rise of human rights, developments in international legal theory, and the international system's need to adapt to changing circumstances have also put pressure on the reified role of "treaty" in identifying rules of international law.

Drawing from a number of theories developed to explain why states comply with international law, this Article proposes a new doctrine of sources focused on opinio juris and how norms come to be accepted as international law. Rather than taking for granted that a treaty reflects international law, the rules laid out in a treaty would themselves be judged by the internalized norms supporting them, either (a) in the strength and legitimacy of the process that led to the adoption of those rules or (b) in the customary acceptance of the rule itself. This Article argues that such a revised doctrine of sources will better capture which rules are actually treated as law in the international system, blunting skepticism about international law and placing international law on firmer footing.

INTRODUCTION

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INTRODUCTION

International law is plagued by two deeply held, apparently incompatible intuitions. The first, to which international law skeptics often appeal, is that international laws are regularly broken. This intuition seems to be supported by a long list of well-known, high-profile treaty violations. Both the U.S.-led invasion of Iraq and NATO intervention in Kosovo proceeded without the Security Council authorization required by the U.N. Charter. Prisoners captured by the United States in Iraq and Afghanistan (as well as elsewhere) have suffered abuse despite clear treaties prohibiting their mistreatment. And most of all, states like Sudan, Saudi Arabia, Uzbekistan, and Zimbabwe continue to violate the human and civil rights of their citizens in direct contravention of the human rights treaties they have signed. International law skeptics see these violations as proof of international law's relative inefficacy.\(^1\) In their view, international law exerts little independent influence over state action.\(^2\) For some, the patterns of noncompliance are proof that international law is "law" in name only.

Recent empirical work also seems to support this intuition. Skeptics of international law point to studies that seem to show little or no correlation between signing human rights treaties and better human rights practices.\(^3\) One recent study seems to go even further, presenting empirical evidence that those states most likely to ratify human rights or environmental treaties may also be those least likely to follow them. According to this study, states with strong commitments to human rights and strong internal actors (e.g., courts and NGOs) may be less likely to ratify a treaty—even if it requires actions the state already follows—because it is far more likely that those actors will require the state to comply. At the same time, states with weak internal actors may ratify those treaties because they are unlikely to be held to their provisions after receiving the initial public-relations benefit of ratification.\(^4\) Such findings, which drive a wedge between the rules identified as international law and the actual practice of states, provide powerful fodder for those who believe that international law is meaningless.

Yet this first intuition somehow coexists with a second, equally powerful intuition that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."\(^5\)

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1. Jack L. Goldsmith & Eric A. Posner, The Limits of International Law 225 (2005) ("International law is a real phenomenon, but international scholars exaggerate its power and significance.").
2. Id. at 108 (concluding that "modern multilateral human rights treaties have little exogenous influence on state behavior").
3. Id. at 121 (finding "no evidence that ratification of human rights treaties affects human rights practices").
Louis Henkin's famous statement is repeated almost as a mantra by many international law scholars, and it clearly drives their work. Proponents of this view downplay the high-profile violations cited by international law skeptics. Those violations are the exception rather than the rule; regular compliance with the rules—wars not fought, rights not violated—is simply harder to observe. Moreover, where the skeptics see proof that international law is mere illusion, international law optimists see compliance problems that can be understood and fixed.

These international law optimists instead point to the growing network of trade and investment treaties and the myriad humdrum ways international law regulates modern global life. A list of “International Law: 100 Ways It Shapes Our Lives,” prepared by the American Society of International Law for its 100th anniversary, demonstrates this ethos. The items included on the list demonstrate how ordinary compliance with international law has become. The list includes “[a]lways knowing what the date and time is anywhere on the planet,” “[m]ailing a letter reliably and easily to anyone in the world,” “[d]riving freely and legally in another country,” “[p]reventing your income, should you earn any in a foreign country, from being taxed twice,” and “[e]nforcing an arbitral award without

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7. Harold Koh uses the statement to frame his transnational legal process theory. See Harold Hongji Koh, The 1998 Frankel Lecture, Bringing International Law Home, 35 Hous. L. Rev. 623, 632 (1998) [hereinafter Koh, Bringing International Law Home] ("In Professor Henkin's famous phrase, 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.' But if this is so, why do they obey?"); Harold Hongji Koh, How Is International Human Rights Law Enforced?, 74 Ind. L.J. 1397, 1411 (1999) [hereinafter Koh, How Is International Human Rights Law Enforced?] ("I merely suggest viewing human rights enforcement through vertical, 'transnational legal process' lenses can help explain why in Louis Henkin's famous phrase, 'almost all nations observe almost all principles of international law almost all of the time.'"). Thomas Franck frames his theory this way, though without actually quoting Henkin. Thomas M. Franck, Legitimacy in the International System, 82 Am. J. Int'l L. 705, 705 (1988) [hereinafter Franck, Legitimacy] ("This observation is made not to register optimism that the half-empty glass is also half full, but to draw attention to a pregnant phenomenon: that most states observe systemic rules much of the time in their relations with other states.").
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a local court having to hear the dispute anew.\(^8\) All of these result from the regularized operation of international agreements.\(^9\)

International actors and international law scholars have often chosen sides in this debate, preferring one intuition over the other. Proponents of the Bush Doctrine and its unilateralism find support in the first intuition; advocates of the International Criminal Court take solace in the second. Tension between these two intuitions remains a powerful driving force behind international law and practice. In general, however, the two sides end up arguing past each other, and battles between the two intuitions and their proponents end in stalemate—neither side is able to convince the other to abandon its deeply held beliefs.

This Article suggests a way to reconcile these two intuitions, a way to conceive of international law that takes both intuitions seriously. There are a few ways one could conceptualize the gaps between the dictates of treaties and actual state practice. One way would be to accept that treaties are international law but recognize that some of those laws are often violated. A second way would be to suggest that there is no such thing as international law and that widespread violation proves the point. Finally, a third way would question our method for identifying international law—in other words, it would suggest that there is international law, but treaties are not necessarily it. This Article takes the third approach and suggests a revision, or at least rethinking, of the traditional doctrine of sources. Rather than treat the apparent gaps between treaties and compliance as evidence of international law's inefficacy or as proof that international law is a myth, this Article argues for a rethinking of what the rules of international law actually are.

In searching for a rule of international law, sources have traditionally been arranged in a rough hierarchy of: (1) treaties, (2) custom, and (3) general principles of law and equity. Treaties are generally treated as the best and strongest source of international law rules. To a certain extent, treaties and international law are often treated as one and the same. Custom and general principles act as sources of international law in the absence of a treaty. This hierarchy emphasizes a positivist concern with state consent over the internalization of norms. It prefers the formality and definition of treaties over less tangible sources of law.

But what if treaties are not, in and of themselves, the law? This Article argues that the traditional doctrine of sources—with its focus on consent and formality and its idolization of treaties—is outdated and needs to be revised. The doctrine was designed to describe a late-nineteenth-century

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world. Its hierarchy of treaties, custom, and general principles did a reasonable job of identifying the rules treated as law in an international system made up of few states and in which treaties reflected attempts at state coordination. But changes in the international system since that time—the rapid inclusion of new states into the system, the rise of human rights, the creation of international and transnational bodies, and the resultant changes in the nature and subject-matter of treaties—have put great strain on the doctrine. Largely unchanged, the doctrine has struggled to identify and categorize modern international phenomena. The result, this Article argues, is a disconnect between the rules identified as law by the doctrine of sources and the rules actually treated as law by the actors in the international system. Our warring intuitions about international law are just one manifestation of the confusion this disconnect produces.

This Article seeks to bridge this divide, to realign our method for identifying the rules considered international “law,” namely the doctrine of sources, with the rules actually treated as law by international actors. To do so, this Article seeks guidance from a different and currently vibrant area of international legal theory: recent explanations of when and why states comply with international law.10 Whereas the doctrine of sources remains tethered to positivist concerns with state consent and formality, a number of these theories have sought to explain how international law works by focusing on processes of norm internalization and legitimization.11 These theories attempt to explain how international law rules come to exert their force and, as such, can provide hints as to which rules will be treated as “law” by international actors.

Drawing on these theories, this Article suggests that a more accurate picture of international law would de-emphasize a rule’s form—treaty,
custom, or something else—in favor of *opinio juris*: the traditional element of customary international law requiring belief that a rule is a legal obligation. A new doctrine of sources would focus on the processes by which rules come to be internalized by international actors. Rather than taking for granted that a treaty reflects international law, the rules laid out in a treaty would themselves be judged by the internalized norms supporting them, either in (1) the strength and legitimacy of the process that led to the adoption of those rules or (2) the customary acceptance of the rule itself. The presence of a treaty would merely be evidence of a rule of international law requiring deeper analysis.

Shifting our focus to how norms come to be accepted as international law, we can begin to construct a new hierarchy of sources built on how deeply different norms are internalized in the international system. This new hierarchy would be made up of roughly three groups of sources: (1) Core International Law, (2) Legitimated Rules, and (3) Aspirational International Law—each carrying more force as law than the next.

The first group, Core International Law, would include the most basic and accepted norms of international law. These norms can be divided into two basic types. The first, Internalized Norms, are deeply internalized, widely accepted, substantive international norms, like *jus cogens* prohibitions on piracy, slavery, and genocide. The second, Process Values, are deeply internalized understandings of the processes and qualities that make particular rules binding. Such Process Values might include qualities like the determinacy, consistency, and pedigree of agreed-upon rules, as well as the clarity of agreed-upon enforcement mechanisms. Where these qualities are present, the "law" quality of the rules with which they are associated will be more widely accepted.

The second group within the new hierarchy, Legitimated Rules, would build upon this base and include those treaties and customary rules of international law backed by strong Process Values. Treaties and custom falling in this category would constitute binding international law because of the legitimacy of the process underlying them.

Finally, the third group, Aspirational International Law, would include those rules described in treaties that have not yet been internalized as substantive norms of the system and that are not backed by strong Process Values. Rules falling in this category might represent the aspirations of the international system and might have considerable moral or political force. They would not, however, have full status as "law."

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12. In order to find customary international law, one must find both custom—that states act this way—and evidence of *opinio juris*—that states follow the rule because they believe they are legally required to do so, not simply because it is pragmatic. Notably, evidence of *opinio juris* can be established by the violation of the rule, if the violating state makes efforts to justify its actions rather than simply acting.
All three of these groups would exist along a continuum. They would not be static categories but rather snapshots of international law at a given time. A rule that today falls within Aspirational International Law might over time be internalized by international actors; the treaty that includes that rule may gain pedigree and legitimacy through the passage of time. All of international law, including both treaties and customary international law, would exist as part of one dynamic phenomenon of rule legitimization and internalization.

Once the presumption that treaties are authoritative statements of international law is stripped away, we can begin to see how both intuitions about international law can be true. A great deal of international law is followed regularly, but it is not necessarily that described by treaties. Certain high-profile treaties may be regularly violated, but those treaties may not yet constitute international "law." The revised doctrine of sources described here helps distinguish between those rules that are international "laws" and those that are mere aspirational statements, and between those actions that violate international law and those that are taken in the absence of it.

Two important points should be made about what this new doctrine of sources would not do. First, the new doctrine described here does not seek to equate law with compliance or to eliminate instances of non-compliance. The quality this doctrine seeks to identify, whether a rule is treated as law, is significantly distinct from whether a rule is complied with. Even where a rule is understood as a legal obligation, where violations are seen as legal breaches to be avoided, and where sanctions are seen as legitimate responses to violation, an actor may choose not to follow the rule. Although many people choose to speed, they likely still recognize the speed limit's status as law and would likely accept a ticket as a valid punishment. A revision of the doctrine of sources should eliminate some of the stranger, harder-to-explain patterns of non-compliance, but as in any legal system, instances of non-compliance will remain.

Second, the goal of this alternative doctrine of sources is to better identify the rules currently treated as law by international actors. Although adopting such a doctrine is a desirable improvement over our current system, the new doctrine is not meant to provide the "best" or most desirable vision of what international law could be.

Despite these caveats, this project is much more than just a semantic exercise. At the theoretical level, the revised doctrine would bring treaties and custom into a single theory, would draw the increasingly anachronistic and theoretically orphaned doctrine of sources into current trends in international legal theory, and would begin to provide answers to

13. They may, for example, find the consequences of compliance more dangerous than violation. Such a calculation may be particularly likely in situations involving national security. See Guzman, A Compliance-Based Theory, supra note 6, at 1883–86.
longstanding problems like the status of human rights declarations, the possibility of instant custom, and the difficulty of change in treaty regimes.

At a practical level, the revised doctrine should have a positive effect on state practice, helping to put international law on stronger footing and enhancing its authority as a guide to state action. The apparent gaps between the rules identified as law by the current doctrine of sources and the rules actually treated as law by states fuel skepticism about international law more generally. Such skepticism saps international law of its strength and authority, providing too easy an excuse for states to violate its rules. By focusing more closely on *opinio juris*, the revised doctrine of sources suggested here should better capture which rules are actually treated as law in the international system and, thus, serve as a more credible, harder-to-dodge guide of which actions will be perceived to violate international law, will be worthy of rebuke by the other states, and may legitimately be met with sanctions. The revised doctrine should help tear down the distinction between the "law on the books" and the law that matters.

This Article proceeds in four parts. The first two parts look at how we came to accept our current sources orthodoxy and why it may no longer be accurate. Part I provides some background on the doctrine of sources. It looks at the traditional role played by custom, *opinio juris*, and treaties in the identification of rules of international law. It also looks at how the relative importance of various sources has changed over time. The Part explains how earlier international law scholars viewed the sources of international law, as well as the greater weight they placed on custom. It then describes the rise of modern positivist theories of international law in the nineteenth century and how they led to the primacy of treaties among sources.

Part II presents some present-day challenges to the positivist hierarchy of sources. Part II.A explains how the rapid increase in the number of states in the international system over the last one hundred years, combined with a shift in emphasis from treaties concerned with state coordination to those concerned with human rights and the internal affairs of states, have transformed the nature of treaty-making. Part II.B examines how courts and theorists have dealt with new sources—in particular, U.N. General Assembly Resolutions—that are not treaties, but that nonetheless indicate some weaker consensus on international issues. The Section will consider how those sources have been used as "evidence" of customary international law and the "crystallization" of legal rules. Part II.C ponders the question of desuetude and how treaties can or should change when faced with changing circumstances. Finally, Part II.D looks at the challenges posed by recent studies indicating that the states least likely to follow certain treaties may be the same states most likely to sign them.

Parts III and IV develop a new doctrine of sources. Part III looks for inspiration in a number of theories designed to explain when and why states do comply with international law. In particular, it explores two such
theories, (1) Harold Koh's theory of transnational legal process and norm internalization\(^\text{14}\) and (2) Thomas Franck's theory of international law as legitimacy,\(^\text{15}\) in hopes of understanding how and when international rules come to be seen as law. Part IV introduces a new doctrine of sources. It explains how theories of norm internalization and legitimacy discussed in Part III, originally conceived as theories of why states obey international law, can be used to construct a theory of what international law is and how international law can be identified. It lays out a specific new hierarchy of sources that emphasizes norm internalization and *opinio juris*. Part IV concludes by considering how such a new doctrine would work in practice, exploring the effect such a new doctrine would have on (1) international legal theory, (2) international dispute resolution, (3) the direction of state action, and (4) the legislation of new international rights.

I. THE SOURCES OF INTERNATIONAL LAW

Much of our day-to-day understanding and discussion\(^\text{16}\) of international law rests on assumptions provided by the doctrine of sources. The doctrine is both more and less than an instruction manual on how to find rules of international law. Instead, it is a general understanding of how and where international law rules can be found, a methodology for identifying valid rules of international law, and a theory of international law's bases.\(^\text{17}\) As explained in Part I.A., this understanding has generally emphasized sources demonstrating state consent. However, as Part I.B. will explain, this preference is neither timeless nor inherently obvious. Instead, the accepted wisdom of the modern doctrine of sources is a product of historical trends converging in the nineteenth century.

A. THE MODERN DOCTRINE OF SOURCES

Discussion of the sources of international law often starts with Article 38(1) of the Statute of the International Court of Justice ("ICJ").\(^\text{18}\) Under the statute:

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16. Whether practice also rests on assumptions provided by the doctrine of sources will be considered *infra* in Part II.D.


The Court, whose function is to decide in accordance with international law such disputes as are submitted to it shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) international custom, as evidence of general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of international law.\(^9\)

The first two sources listed are generally accepted as the two main sources of international law.\(^20\) The first, international conventions, refers to treaties, both multilateral and bilateral. The second, "international custom, as evidence of general practice accepted as law,"\(^21\) refers to customary international law. As the definition in the statute implies, customary international law requires two elements: (1) the general practice of states and (2) evidence that the practice arises out of a sense of legal obligation, rather than coincidence or self-interest.\(^22\) This second, "psychological" element is known as *opinio juris* and has been commonly found in the statements of state officials.
In many ways, the two main sources are a study in contrasts; the relative strengths of one are the weaknesses of the other. Treaties, because they are written, have the advantage of definition and certainty. This definition extends to the interpretation of treaties as well; although treaty interpretation is still influenced by customary international law principles, its general rules have been codified and agreed to in a treaty.\(^{23}\) Treaties also carry a perceived legitimacy that comes from being negotiated. At the same time, however, the law-making authority of treaties is limited. The vast majority of treaties are between relatively few states, and treaties establish law only between their parties.\(^{24}\) Treaties establish universal international law only when they have been universally ratified. Treaties also have the disadvantage of rigidity; once ratified, it becomes very difficult to change the rules.\(^{25}\) Treaties can thus seem anachronistic as the circumstances that led to their negotiation melt away.\(^{26}\)

Custom, by contrast, is difficult to identify, but highly fluid. Evidence of consistent state practice is often elusive; what evidence there is is often open to various interpretations. The same can be said of the more ephemeral *opinio juris*. Identifying a rule of customary international law requires careful sifting through sometimes limited, sometimes voluminous, often contradictory evidence of state practice and *opinio juris*. Disagreements over rules are not uncommon. Accordingly, when courts do apply customary international law, as they still commonly do,\(^{27}\) they open themselves to criticism that they have misidentified the rule, weighed state practice

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24. SeeDamrosch et al., supra note 18, at 110 (“A third category of treaties—by far the largest in number—includes bilateral agreements and, for some purposes, agreements by three or four states.”); see also U.N. Office of Legal Affairs, Treaty Section, Treaty Handbook § 5.5.2 (2001), available at http://untreaty.un.org/ola-internet/Assistance/handbook_eng/hbframeset.htm (“The majority of treaties registered pursuant to Article 102 of the Charter of the United Nations are bilateral treaties.”).


26. See infra Part II.C.

incorrectly, or overstated the presence of *opinio juris*. Moreover, changing sources of international law, including U.N. declarations and unsigned treaties, have been thrown into the customary international law mix; although they are commonly used as evidence of custom, what role these sources should play remains highly controversial. Custom does have the advantage of allowing for change, although some argue that custom changes too quickly (arguing that courts cherry-pick evidence of practice and *opinio juris* to reach desired results) and others argue that it changes too slowly (because of the requirement of changed general practice). One ever-present problem is that the same behavior can constitute either a violation of the customary rule or evidence of a new rule. Similarly, a statement that overstates the rule, although inaccurate, may move the rule in that direction. “Ought” and “is” are inextricably intertwined.

Although the ICJ statute does not specify any greater weight to be given to one source or another, the order in which the sources are listed has often been understood as a rough hierarchy—treaties are often considered first and treated as most authoritative. Moreover, some of the contrasts between


29. See, e.g., Igartua-de la Rosa v. United States, 417 F.3d 145, 176 (1st Cir. 2005) (“The ICCPR, the UDHR, the American Declaration, the ACHR and the IADC are all evidence of the emergence of a norm of customary international law with an independent and binding juridical status.”); Beharry v. Reno, 183 F. Supp. 2d 584, 597-98 (E.D.N.Y. 2002).


32. DAMROSCH ET AL., supra note 18, at 108 (“Article 38 of the Statute of the International Court, in its list of sources according to which disputes are to be decided, gives first place to ‘international conventions, whether general or particular, establishing rules expressly recognized by the contracting States.’”); JANIS & NOYES, INTERNATIONAL LAW, supra note 18, at 22 (“Partly because ‘international conventions’ are listed first in Article 38(1), the judges of the ICJ and other international lawyers have often given treaties pride of place among sources of international law.”); STEINER ET AL., supra note 18, at 271 (“Whatever its purpose or character, the international agreement is generally recognized from the perspective of international law as an authoritative starting point for legal reasoning about any dispute to which it is relevant.”); see also 1 HERSCH LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS 86-87 (1970). As Lauterpacht explains:

The rights and duties of States are determined in the first instance, by their agreement as expressed in treaties . . . . When a controversy arises between two or more States with regard to a matter regulated by a treaty, it is natural that the
treaty and custom have seemingly favored treaties. "Treaties ordinarily clearly show the legal rule because they are in written form. Moreover, treaties are subject to the explicit acceptance of states. Treaties therefore can often be clearer in their terms and more certain in their acceptance than other sorts of international law sources."

Such a hierarchy and list of sources reflects the prevailing positivist understanding of international law. According to this view, international law is based primarily on the consent of sovereign states. Treaties, having been negotiated, written, signed, and ratified, present the strongest evidence of consent. That the states signing the document consented to be so bound is easy to conceptualize. Customary international law presents a more difficult problem, but here, too, the basis is seen as consent—in this case, "implied" consent. Evidence of general state practice, in the absence of

Id.

33. JANIS & NOYES, INTERNATIONAL LAW, supra note 18, at 22.

34. Antony Anghie, Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law, 40 HARV. INT'L L.J. 1, 2 (1999) ("Despite subsequent attempts to reformulate the foundations of international law, the fundamental positivist position, that states are the principle actors of international law and that they are bound only by that to which they have consented, continues to operate as the basic premise of the international legal system."); Aaron Fichtelberg, Legal Rules and International Society, 15 EMORY INT'L L. REV. 157, 161 (2001) (reviewing ANTHONY CLARKE AREND, LEGAL RULES AND INTERNATIONAL SOCIETY (1999)) (discussing a "more-or-less traditional exposition of the positivist doctrine of sources: states create international law through their 'consent' (found in the practices of these states, coupled with opinio juris, as well as with the formulation of treaties)," and "the traditional sources of international law—treaties, custom, and 'general principles'"); see also SCHACHTER, supra note 17, at 35–36. Schachter states:

The principal intellectual instrument in the last century for providing objective standards of legal validation has been the doctrine of sources. . . . The emphasis in this doctrine on criteria of law applied solely on the basis of observable 'positive' facts can be linked to those intellectual currents of the nineteenth century that extolled inductive science.

Id.

35. See Charney, supra note 20, at 531 ("Perhaps the most popular theory is that states become bound to the international legal system on the basis of social contract, actual consent or tacit consent."); Duncan B. Hollis, Why State Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law, 23 BERKELEY J. INT'L L. 137, 141 (2005) ("[M]ost international lawyers continue to explain how these rules constitute law by referring to the notion that 'the general consent of states creates rules of general application.'" (citing IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (6th ed. 1995))).

36. See JANIS & NOYES, INTERNATIONAL LAW, supra note 18, at 22.

37. OPPENHEIM, supra note 20, at 22. Oppenheim states:

The sources of International Law are therefore twofold—namely: (1) express consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) tacit consent, which is given
consistent dissent, is seen as evidence of tacit acquiescence by all states to the customary rule. As the evidence of consent to custom is more attenuated than consent to treaties, it should not be surprising that treaties are given a place of honor. Even when generalized state consent to a particular custom might be clearer, the scope of what has been consented to will remain difficult to pin down.

B. EARLIER VIEWS ON THE SOURCES OF INTERNATIONAL LAW

Treaties did not always carry so much weight. Until relatively recently in world history, treaties, and in particular multilateral treaties, were the exception rather than the norm. It was custom, rather than treaty, that formed "the older and the original source of International Law." The grand majority of international law was customary. Earlier international law theorists were thus primarily concerned with custom and with explaining the largely unwritten rules that appeared to govern the relations of states.

The most prominent early explanation was natural reason. According to this view, the law of nations was the necessary outgrowth of the laws of nature and could be discerned through the application of reason. Such a theory explained why and how states had come to follow agreed-upon rules of international relations and why such rules had been discussed and debated in legal terms. Two of the earliest thinkers associated with international law, Francisco de Vitoria and Francisco Suarez, took just such a natural-law view—albeit with strongly religious undertones. Hugo Grotius, writing in the seventeenth century and often referred to as the "founder" or "father" of international law, took a more complex view, combining elements of both natural reason and consent. For Grotius, international law had two sources: (1) the law of nature and (2) mutual consent—or, in his through States having adopted the custom of submitting to certain rules of international conduct.

Id.; see also Chantal Thomas, Customary International Law and State Taxation of Corporate Income: The Case for the Separate Accounting Method, 14 BERKELEY J. INT'L L. 99, 114 (1996) (identifying as a characteristic of customary international law that "[t]he international law must be consistently practiced by nations whose interests it clearly affects, with the tacit consent or acquiescence by those nations whose interests it does not").

38. Id.; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. d (1987). The Restatement provides:

Although customary law may be built by the acquiescence as well as by the actions of states (Comment b) and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures.

39. OPPENHEIM, supra note 20, at 22.

terms, "the law of nations." These two sources, however, were deeply and inextricably intertwined. An observed custom could be evidence of either a principle derived from the law of nature or of mutual consent. Rules of international law could be derived from natural reason, but customary international law was also evidence of what natural reason required. Grotius's framework married custom and reason, imbuing the practice and opinio juris of states with great power and legitimacy.

A century later, in the mid-eighteenth century, Emerich de Vattel described the law of nations as a system "based on the principles of the law of nature and written with a view to practical application." Vattel differentiated between rules derived from the law of nature and rules derived from human agreement, "[h]owever, it was the guiding natural law that controlled: No agreement could bind, or even authorize, a man to violate natural law." A few years later, Sir William Blackstone took a similar natural-law view in his Commentaries on the Laws of England. According to Blackstone:

The law of nations is a system of rules, deducible from natural reason, and established by universal consent among the civilized inhabitants of the world . . . but such rules must necessarily result

41. "[W]hen many at different times, and in different places, affirm the same thing as certain, that ought to refer to a universal cause; and this cause . . . must be either a correct conclusion drawn from the principles of nature, or common consent." 2 HUGO GROTIUS, DE JURE BELLII AC PACIS LIBRI TRES 23-24 (James Brown Scott ed., Francis W. Kelsey et al. trans., Clarendon Press 1925) (1625).

42. Adding to the confusion, "Grotius often speaks of the law of nature and the law of nations as if the two impose identical obligations on states—as if, notwithstanding their different sources, the law of nature and the law of nations speak to states with one voice." INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 36 (Robert J. Beck et al. eds., 1996).

43. According to Grotius, the law of nature could be proven by either of two means: a priori, "by demonstrating the necessary agreement or disagreement of anything with a rational and social nature," see GROTIUS, supra note 41, at 42, and a posteriori (as a matter of probability if not absolute certainty), by showing what is believed to be the law of nature "among all nations, or among all those that are more advanced in civilization." Id.; see also Benedict Kingsbury, A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull, 17 QUINNIPIAC L. REV. 3, 22-23 (1997) (quoting HUGO GROTIUS, DE JURE BELLII AC PACIS LI.12 (n.p. 1625)).

44. Cf. David J. Bederman, Reception of the Classical Tradition in International Law: Grotius' De Jure Belli ac Pacis, 10 EMORY INT'L L. REV. 1, 8 n.26 (1996) ("Grotius' consideration of universality and right reason tracks our modern notions of the formation of customary international law, including the requirements of a general practice and opinio juris (a sense that a practice is carried out because of legal obligation). ").


46. Jianmeng Shen, The Relativity and Historical Perspective of the Golden Age of International Law, 6 INT'L LEGAL THEORY 15, 20 (2000). Although natural law does play a prominent role, Vattel has often been described as a nascent positivist because of his differentiation of the law of nations and the law of nature. See Anghie, supra note 34, at 12.
from those principles of natural justice, in which all the learned of each nation agree: or they depend upon mutual compacts or treaties between respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.⁴⁷

Customary international law was thus derived from natural reason (though consent seems to play some unclear role).⁴⁸ Treaties were secondary, and they, too, were to be construed in accordance with natural reason.⁴⁹

Within the natural-law framework adopted by these earlier thinkers, custom became quite powerful, both theoretically and normatively. The often-mysterious process by which practices become accepted as law, or opinio juris, was explained and imbued with divine, or natural, rationality. Treaties, although practically important, were almost by necessity a theoretical afterthought. Although a treaty could codify the requirements of natural law, generally, its content would arise solely from the agreement of two or more states. Moreover, the ultimate legitimacy and law-quality of the treaty would depend on customary international law and right reason, namely the customary rule that states must follow their agreements, also known as pacta sunt servanda.⁵⁰

Over the course of the nineteenth century, however, various factors converged to change this general understanding. On the theoretical front, natural law was facing increasing pressure. International lawyers increasingly "sought to present their discipline as ‘scientific’ in character,"⁵¹ to emulate the natural sciences, and to identify a methodology and definitions for use in interpreting international law. "[T]his involved redefining the discipline

⁴⁷. ⁴ WILLIAM BLACKSTONE, COMMENTARIES 66-67 (Univ. of Chic. Press 1979) (1765-1769).
⁴⁹. James Kent held similar views:

The law of nations is a complex system, composed of various ingredients. It consists of general principles of right and justice, equally suitable to the government of individuals in a state of natural equality, and to the relation and conduct of nations; of a collection of usages and customs, the growth of civilization and commerce, and a code of conventional or positive law.

Id. at 28 (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 2-3 (New York, Halstead 1832) (1826–1830)).
⁵⁰. See MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES 107 (1999) ("Treaty rules . . . are based on the general customary rule of pacta sunt servanda, which requires that treaty obligations be upheld in good faith.").
⁵¹. Anghie, supra note 34, at 10.
in ways that appeared compatible with the scientific framework in an attempt not only to elevate their discipline, but their profession.\textsuperscript{52}

International law theorists were also increasingly responding to the criticisms of John Austin.\textsuperscript{53} Austin, "the foremost spokesman for positivism at the time,"\textsuperscript{54} had sought to distinguish law from morality and excuse references to natural law. Instead, he defined law as the command of the sovereign backed by force.\textsuperscript{55} For Austin, in the absence of any international sovereign, international law could not be law at all.\textsuperscript{56} By his estimation, international law belonged to "a set of objects frequently, but improperly termed laws," more akin to "'[t]he law of honour'" or "'[t]he law set by fashion.'"\textsuperscript{57} What was called international law was nothing more than positive morality.

These intellectual trends\textsuperscript{58} were buttressed by practical changes in the world international lawyers were describing. Treaty-making, and in particular multilateral treaty-making, increased dramatically over the period.\textsuperscript{59} A growing number of international conferences—including the 1863 Postal Conference, the 1863 Geneva Red Cross Conference, the 1884 Berlin Conference on the Future of the Congo, and the 1899 and 1907 Hague Peace Conferences—were convened to deal with international law topics.\textsuperscript{60} A wide variety of international institutions were also created to deal

\begin{itemize}
  \item 52. \textit{Id.} at 18.
  \item 53. \textit{Id.} at 14.
  \item 54. \textit{Id.}
  \item 55. \textbf{JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED} 9 (David Campbell & Philip Thomas eds., Ashgate 1998) (1832); \textit{see also id.} at 101 (arguing that "[l]aws properly so called are a species of commands" and "every law properly so called flows from a determinate source").
  \item 56. "[T]he law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author." \textit{Id.} at 152.
  \item 57. \textit{Id.} at 10.
  \item 58. Martti Koskenniemi identifies another influential theoretical challenge in Friedrich Carl Von Savigny's historical school of law, which criticized the static nature of international law derived from immutable natural reason. To the extent international law was derived from natural reason, its rules could not change—the correct rules have always been correct and always will be correct. Instead, Savigny argued that law should be seen as an organic and evolving outgrowth of the popular consciousness. \textbf{MARTTI KOSENNIEMI, THE GENTLE CIVILIZER OF NATIONS} 43-47 (2002). According to Koskenniemi, it was Savigny's arguments that inspired Johann Caspar Bluntschli to write his international law code in 1867. \textit{See id.} At the same time, Savigny's historical school heavily influenced the Institut de droit international, which in 1873 described its goal as to be "the legal conscience of the civilized world." \textit{See id.} at 41, 47.
  \item 59. \textit{See JANIS, AMERICAN TRADITION, supra note 48, at 119 (citing NUSSBAUM, supra note 45, at 196-97, and estimating that ten to sixteen thousand treaties were ratified during that period); Shen, supra note 46, at 25 (citing NUSSBAUM, supra note 45, at 196-97, for the estimate that "about sixteen thousand treaties were concluded between [1815] and 1924"); see also OPPENHEIM, supra note 20, at 23 ("Treaties are the second source of International Law, and a source which has of late become of the greatest importance.").
  \item 60. \textit{See Shen, supra note 46, at 25-26.}
\end{itemize}
with issues as varied as telegraph administration, the abolition of slavery, and public health.\(^6\)

The period also saw an increased interest in the codification of existing customary international law. Johann Caspar Bluntschli, a Swiss lawyer and professor, published a "code-like" international law treatise in 1868,\(^6\) and David Dudley Field, the American who prepared the 1848 New York Code of Civil Procedure, published a draft international code in 1872.\(^6\) Codification culminated in the Hague Conventions of 1899 and 1907, which attempted to codify the laws of war.\(^6\) All of these developments made deriving international law from multilateral treaties look increasingly possible and engendered optimism that the relatively small (though growing) group of states could solve coordination problems through negotiation.

These changes in international legal thinking and the practice of states\(^6\) help explain why "[t]he late nineteenth century was ... the period in which positivism decisively replaced naturalism as the principal jurisprudential technique of the discipline of international law."\(^6\) International law needed to become more scientific, and state consent seemed to provide an answer.\(^6\) State consent could provide a positivist basis for international law in the absence of a sovereign and could be used as a scientific criterion of investigation.

The international legal positivism that emerged may be best exemplified by Lassa Oppenheim's early twentieth century international law textbook. First, Oppenheim explained that international law is law between sovereign states, not individuals:

\[\text{[T]he law of Nations is a law for the intercourse of States with one another, not a law for individuals. As, however, there cannot be a sovereign authority above the single sovereign states, the Law of Nations is a law between, not above, the single States, and is, therefore, since Bentham, also called "International Law."}\]
Second, "the basis of the Law of Nations is the common consent of the member States of the Family of Nations."\(^69\) The consent takes two forms:

(1) *express* consent, which is given when States conclude a treaty stipulating certain rules for the future international conduct of the parties; (2) *tacit* consent, which is given through States having adopted the custom of submitting to certain rules of international conduct. Treaties and custom are, therefore, exclusively the sources of the Law of Nations.\(^70\)

Finally, "[n]atural law, in Oppenheim's view, forms no part of international law; and indeed he holds in addition that it does not exist."\(^71\)

Many of the trends supporting Oppenheim's positivism have continued over the past century. Both multilateral treaties and international institutions have multiplied, and states are increasingly interwoven by formal, structured, written relations. These trends have continued to enhance the stature of treaties. But at the same time, a great deal has changed since Oppenheim first wrote his textbook. Two world wars have been fought, the European empires have crumbled, a Cold War has ended, and the number of states in the international system has increased many times. International law has reached deeper and deeper into the internal affairs of states, making individuals increasingly subjects of international law.\(^72\) Non-state actors (e.g., corporations and NGOs) unconnected to a particular state have increasingly influenced international law. And over time, numerous powerful alternatives to positivism have been developed, including the New Haven policy school, international legal process, transnational legal process, international law as legitimacy, and liberal international law theory.\(^73\) Nonetheless, the positivist method and hierarchy

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\(^69\) Id. at 21.

\(^70\) Id. at 22 (internal citation omitted).


\(^72\) See, e.g., Gabriel M. Wilner, Filartiga v. Pena-Irala: Comments on Sources of Human Rights Law and Means of Redress for Violations of Human Rights, 11 GA. J. INT'L & COMP. L. 317, 320 (1981) ("The notion that all individuals have rights independent of what may be granted them under national law, including their own national law, adds a dimension to international law unknown to it when the sources of the law of nations were set forth in the nineteenth and twentieth centuries.").

laid out by Oppenheim remain the durable tools used by most international lawyers.\textsuperscript{74}

II. THEY SHOOT TREATIES, DON'T THEY?:
CONTEMPORARY CHALLENGES TO THE POSITIVIST HIERARCHY

The resilience of Oppenheim's system has been tested as a changing world and new developments have forced international lawyers to stretch (to the breaking point?) old categories and theories in multiple directions. Challenges to the positivist hierarchy include dramatic changes to the shape of the international system and the emergence of new sources of international law. Other challenges include the apparent gap growing between treaties and state action and concerns about treaties' relative inability to adapt quickly enough to a constantly changing world.

\textbf{A. GROWING PAINS}

The world looked very different in 1905 when the first edition of Oppenheim's \textit{International Law: A Treatise} was published. Only a handful of states made up the European international law system. The group of actors was sufficiently small that Oppenheim could refer to a "Family of Nations."\textsuperscript{75} Moreover, imperialism was at its height, and much of Africa and Asia remained under the control of a very few European states. Even after the inclusion of Japan, Liberia, Haiti, and Turkey,\textsuperscript{76} Oppenheim's system remained mostly European-American and continued to be dominated by the Great Powers. International institutions, although on the rise, were nascent and thin.

The international landscape looks very different today. The current list of states now numbers over two hundred. The empires of the Great Powers have been largely liquidated, and European states no longer make up a majority of the players in the international system. Moreover, international institutions are now everywhere, ranging from the United Nations, the World Trade Organization, the International Monetary Fund, and the World Bank to far more mundane institutions like the International Organization for Standardization ("ISO"). Oppenheim described a world in which the relatively few states drew from a common culture to create a relatively thin international legal system. Perhaps paradoxically, the international system is now made up of a multitude of very different states


\textsuperscript{75} OPPENHEIM, \textit{supra} note 20, at 12, 16–18.

\textsuperscript{76} Id. at 32–34.
with very different histories, interconnected by an increasingly thick set of international obligations.

Such changes strain the old hierarchy in a number of ways. First, proof of consent becomes considerably more attenuated. The vast majority of states had no say in (or ability to object to) the international system put in place after World War II. Their consent to the basic rules of the system is a presumed price of entrance and membership in the international system.\(^\text{77}\)

Second, the massive increase in the number of states must have an impact on the meaning, nature, and content of treaties. Multilateral treaties on important issues of international law were already difficult to agree on in Oppenheim's day, when the consent of only a few states was required. Negotiating between and getting the consent of two hundred states must be more difficult. Agreements may have to be thinner. Moreover, to the extent those states can agree, a number of questions must be asked. Do all of those states agree on the ground rules? Do they all intend to be bound? Do they all invest the process of treaty-making with the same meaning as the older members of the international system? Most of all, do they all necessarily interpret the treaty's meaning in the same way?\(^\text{78}\) Under the traditional understanding of the doctrine of sources, these concerns are largely irrelevant to the question of whether a rule constitutes law. Formal consent to the system and a treaty are what matter. But such questions must place the positivist theory in some doubt.

At the same time that the number of states was exploding, the nature of international law was evolving. Although states continue to sign a multitude of bilateral treaties primarily concerned with economic, political, and military coordination, the past century has witnessed an extraordinary surge in multilateral treaties, many of which seem more concerned with signatory states' internal affairs than with their international relationships.\(^\text{79}\) Examples include the International Covenant on Civil and Political Rights ("ICCPR"), the Convention Against Torture, the Convention on the Rights of the Child, [2007]

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77. Accordingly, whether any particular state currently "consents" in the manner presumed by Oppenheim's theory can only be a matter of speculation. Some new states may very well see the international system as a system of sovereign equality that works to their advantage. Others may see it as imperialism in different clothes—a regime they tolerate, but hardly accept. Others still, usually "rogue states," have chosen simply to disregard the system altogether.

78. For former colonies, for example, international law may be viewed as a tool for vindicating their rights as equal members of the system or as a tool of subjugation that forces them to follow rules written by their one-time occupiers. See, e.g., B. S. Chimni, Third World Approaches to International Law: A Manifesto, in The Third World and International Order: Law, Politics and Globalization 72 (Antony Anghie et al. eds., 2003) ("A growing assemblage of international laws, institutions and practices coalesce to erode the independence of third world countries in favor of transnational capital and powerful States.").

79. See, e.g., Wilner, supra note 72, at 318 ("Since World War II, however, the direct right of individuals to the protection of their lives and of other civil and political rights has slowly gained recognition, independent of the right of redress by states of which they are nationals.").
and the Convention on the Political Rights of Women. These treaties are not necessarily of a different sort than earlier treaties; these treaties often combine both interstate and intrastate elements and must be seen along a continuum with more traditional state-coordination treaties. Nonetheless, the shift of subject matter to human rights and environmental regulation does change the rules of the game. The traditional bilateral state-coordination treaty can rely on reciprocity as a guaranty of both consent and compliance. If one party fails to live up to its side of the bargain, the other party can respond by reneging on its obligation. The treaty only provides the desired benefit for both sides if both sides comply. Although modern multilateral human rights treaties may include mechanisms for ensuring compliance and states may respond to a breach by one party with reprisals of a different sort (e.g., sanctions, invasion), simple reciprocity is not available. If a state tortures its citizens in violation of its treaty obligations, another state cannot torture its own citizens as a reprisal. If a state releases toxic materials into the environment, another state cannot do likewise in response. As Part II.D explains, there are reasons to suspect that the absence of this mechanism leads to less compliance. It may also cast doubt on what states intend when they ratify such treaties.

All of these changes make the optimism about treaties that pervaded the traditional doctrine of sources harder to sustain. They may no longer provide the same evidence of consent and may not exert the same force. They may no longer carry the clarity and certainty that they once did, and the ability to reach comprehensive, widespread, international agreement through treaties cannot be taken for granted.

B. NEW SOURCES AND METHODS

Another challenge to the positivist doctrine of sources arises from the presence of new types of sources that appear to be expressions of what international law requires but that fit uncomfortably between treaty and custom. Various declarations of the international community, including

80. A high percentage of states have ratified these treaties. As of July 7, 2003, 99% of states had ratified the Convention on the Rights of the Child, 91% had ratified the Convention on the Political Rights of Women, 78% had ratified the ICCPR, and 70% had ratified the Genocide Convention and Convention Against Torture. See Goldsmith & Posner, supra note 1, at 108 (citing Office of the U.N. High Comm’r for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties, available at http://www.ohchr.org (updated June 9, 2004)). Other widely ratified human rights treaties include the International Covenant on the Elimination of All Forms of Racial Discrimination, ratified by 88% of states, and the International Covenant on Economic, Social, and Cultural Rights, ratified by 77% of states. Id.

81. See Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 Yale L.J. 1935, 1958 (2002) [hereinafter Hathaway, Do Human Rights Treaties] (“[U]nlike in the case of trade agreements, the costs of retaliatory noncompliance are low to nonexistent, because a nation’s actions against its own citizens do not directly threaten or harm other states.”).
U.N. General Assembly declarations and the Universal Declaration of Human Rights, fall short of the formal requirements of treaties. The increase in multilateral treaty-making has also led to an increasing number of multilateral treaties that, although not yet ratified by some states, declare the presence of universal rights or norms. Some of these specifically claim to be mere codifications of custom, while others seem to express the general consensus on a new rule of international law.

Courts and international theorists have developed a number of tools to deal with these new sources. Unlike ratified treaties, these sources have not been treated as statements of law in and of themselves. Instead, these sources have been seen as possible evidence of customary international law. This can work in three ways. First, the treaty or declaration may merely codify customary international law; the text would thus help identify the scope of the customary rule already in place. Second, the treaty or declaration may represent the "crystallization" of a rule of customary law.

82. As Justice Schwebel explained:

The General Assembly has no authority to enact international law... If a resolution purports to be declaratory of international law, if it is adopted unanimously (or virtually so, qualitatively as well as quantitively) by consensus, and if it corresponds to State practice, it may be declaratory of international law.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 319 (July 18) (dissenting opinion of Justice Schwebel).


84. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 47 (June 21) ("The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject."); see also Avero Belgium Ins. v. Am. Airlines, Inc., 423 F.3d 73, 79 n.8 (2d Cir. 2005) ("[T]he United States has never ratified the Convention. Accordingly, the Vienna Convention is not a primary source of customary international law, but rather one of the secondary sources 'summarizing international law.'" (internal citations omitted)).
international law that had been slowly forming.\textsuperscript{85} Third, the treaty or declaration can be rule-generating, providing a focal point around which custom may coalesce after, and as a result of, the document's adoption.\textsuperscript{86}

All three of these mechanisms help bring these new sources into the structure of the traditional doctrine of sources. Nonetheless, by focusing on the dynamic relationship between these documents and custom, and the role these documents may have in declaring, forming, and generating norms, these mechanisms also undermine the formalism of the positivist system. Rather than focusing on the discovery of static individual rules, these mechanisms emphasize process and norm creation.

\textbf{C. TREATIES NEVER DIE}

In the face of all the changes in the international system, treaties remain static—unchanged by the world around them. One of the main benefits of treaties is the certainty that comes from clear, written terms. States can rely on the treaty even as circumstances change. A new government, for example, is considered bound by the treaties of previous regimes. This reliability allows treaties to act as a stabilizing force in a chaotic world. But the certainty and stability that gives treaties their standing within the traditional doctrine of sources also presents a challenge to that dominance. Treaties can often seem anachronistic as the world changes around them. "After a while, the Treaty can become a rather self-defeating and restrictive matrix on which to project flexibility in the light of modern circumstances: it can become an obstacle for updated relationships rather than a facilitator of that evolution."\textsuperscript{87}

\textsuperscript{85} See North Sea Continental Shelf Cases (F.R.D. v. Den.), 1969 I.C.J. 2, 39 (Feb. 20) (explaining that Article 1 to 3 of the 1958 Convention on the Continental Shelf "were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf"); see also Kane v. Winn, 319 F. Supp. 2d 162, 199 (D. Mass. 2004) ("Regional conventions and treaties mirror international developments, and further confirm the crystallization of customary international law.").

\textsuperscript{86} An unratified treaty could:

\begin{quote}
\[G\text{enerate[\ldots]}\text{ a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed.}\]

\end{quote}

\textit{North Sea Continental Shelf Cases}, 1969 I.C.J. at 41; see also Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980) ("[I]t has been observed that the Universal Declaration of Human Rights 'no longer fits into the dichotomy of "binding treaty" against "non-binding pronouncement," but is rather an authoritative statement of the international community.'" (internal citation omitted)).

Of course, treaties can change. The parties can agree to amend them.  
Oftentimes, treaties include provisions specifically outlining how states can withdraw. Most of all, international law recognizes that treaties can fall into desuetude and recognizes fundamental changes in circumstances, or rebus sic stantibus, as an excuse for nonperformance of a treaty obligation. However, perhaps because both desuetude and fundamental change cut against the very stability that treaties promise, the mechanisms underlying each are unclear and they are rarely successfully invoked. A provision that

88. See Janis & Noyes, International Law, supra note 18, at 49.
89. See Damrosch et al., supra note 18, at 538-59.
90. See Michael J. Glennon, How International Rules Die, 93 Geo. L.J. 939, 957 (2005) ("International law scholars have long recognized that outdated treaty rules can also lose their bite, although the issue is addressed in the major works only in passing."); see also Concerning the Delimitation of the Continental Shelf Between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, 18 R.I.A.A. 3, at ¶ 47 (1977) (recognizing "the possibility that a development in customary law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination, of previously existing treaty rights and obligations"); Anthony Clark Arend, Legal Rules and International Society 89 (1999) ("If... as time passes, the treaty as a whole, or a particular provision of the treaty, loses authority and control, the putative rule contained in the treaty or the provision no longer reflects the willingness of states to restrict their behavior in a given way.").
91. Rebus sic stantibus, originally a customary international law rule, has since been codified in the Vienna Convention on the Law of Treaties. Under Article 62 of the Convention, a fundamental change of circumstances may be "invoked as a ground for terminating or withdrawing from the treaty" if "(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty." Vienna Convention on the Law of Treaties, supra note 23, art. 62.
92. Waldron points out a particularly good example of how Turkey, in negotiating the 1922–1923 Treaty of Lausanne, successfully convinced the British, French, Italians, Japanese, and Americans that the fundamental change in the nature of the state generally and the Turkish state specifically had vitiating the old regime of capitulations. Waldron, supra note 87, at 171-72.
93. See Glennon, supra note 90, at 957-58; see also Athanassios Vamvakos, Termination of Treaties in International Law: The Doctrines of Rebus Sic Stantibus and Desuetude 219 (1985) ("Even those jurists who have discussed the implications of desuetude have themselves been puzzled as how to relate it to any objective rule of law.").
94. See, e.g., Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25) (rejecting excuse); Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3 (Feb. 2) (same); see also Detlev F. Vagts, Rebus Revisited: Changed Circumstances in Treaty Law, 43 Colum. J. Transnat’l L. 459, 475 (2005) ("What can be said is that rebus sic stantibus will not avail unless the change of circumstances is clearly a drastic change from the circumstances anticipated by the parties."). Among the obstacles to the successful invocation of rebus sic stantibus, Article 62 states that fundamental change may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
would have allowed a treaty to "be modified by subsequent practice" was deleted from the final draft of the Vienna Convention on the Law of Treaties, and fundamental change was rejected as an excuse in the two cases in which it was argued before the ICJ.

Without clear rules for change, debates over the status of treaties simply go unresolved. Debates over the meaning and scope of Article 2(4) of the U.N. Charter's prohibition of "the threat or use of force against the territorial integrity or political independence of any state," provide a useful example. Some have argued that as a result of consistent violation, Article 2(4) has become a dead-letter provision and that the rules against the use of force and non-intervention have fallen into desuetude. Others have argued that NATO's intervention in Kosovo has established an exception to Article 2(4) for humanitarian intervention. Still others argue that Article 2(4) remains very much in force. There is no clear principle to determine the right answer.

Vienna Convention on the Law of Treaties, supra note 23, art. 62. These conditions, in particular the requirement that "the fundamental change is [not] the result of a breach by the party invoking it," are high hurdles to jump. See Waldron, supra note 87, at 17.

Glennon, supra note 90, at 957–58 (citing SHABTAI ROSENNE, DEVELOPMENTS IN THE LAW OF TREATIES, 1945–1986, at 9 (1989)).

See id. at 958 & n.95 ("[R]etention of that article' could have 'opened the way to controlled and orderly flexibility in the evolution both of the law in general, and of specific rights and duties of States in particular.'" (quoting ROSENNE, supra note 95, at 9)). In the end, "[t]he deletion 'may be regretted.'" Id. at 958 (quoting ROSENNE, supra note 95, at 9).

See sources cited supra note 94. In the most well-known of these cases, the ICJ refused to absolve post-communist Hungary of its duties under a Soviet-era treaty with the no-longer-extant Czechoslovakia to build dams on the Danube river. See generally Gabčikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7.

U.N. Charter art. 2, para. 4. This example is particularly useful because it demonstrates the difficulty of amending the treaty through a new one. Agreement by all the world's states to a new U.N. Charter provision is difficult to imagine.


In the face of evolving international consensus, the static rules of treaties remain supreme. The law they identify may seem remote from current needs and understandings. Some scholars, seeing such gaps between the realities of practice and the provisions of treaties, have started to search for a principle that would explain and control how and when treaties can change.103 For now, however, the process for changing treaties remains less understood104 than the deeply debated and theorized processes for changing custom.105 Treaties retain their durability.

D. MIND THE GAP

While the three challenges mentioned above are largely theoretical, perhaps the most troubling challenge to the positivist hierarchy is empirical. Recent empirical studies have suggested a growing gap between what treaties require and what the states that have acceded to them actually do. This gap seems particularly pronounced for human rights treaties. For example, Oona Hathaway collected data regarding the human rights activities of states that had ratified five “universal”106 human rights treaties: the Genocide Convention, the Convention Against Torture, Article 21 of the Torture Convention (“Torture Convention”), the ICCPR, and the Convention on the Political Rights of Women, as well the Optional Protocols to both the ICCPR and Torture Convention.107 Hathaway found that “[t]aken together, the results for the group of universal treaties indicate that treaty ratification is usually not associated with statistically significantly different human rights ratings from what would otherwise be expected” in the absence of those treaties.108 “More surprisingly, however,” Hathaway found that “when ratification is associated with statistically significantly different human rights ratings, it is associated with worse, rather than better, human rights ratings than would otherwise be expected.”109 Regional human rights treaties fare even worse. “The results of these analyses suggest that ratification of regional human rights treaties is not infrequently associated with worse than expected human rights practices.”110

103. See generally Glennon, supra note 90 (developing a theory of treaty desuetude); Waldron, supra note 87 (considering the effect that fundamental changes in the international system should have on existing treaty rules).
104. See Glennon, supra note 90, at 957; Waldron, supra note 87, at 167–69.
105. See generally Roberts, supra note 31 (discussing the literature on custom in international law).
107. Id.
108. Id. at 1994.
109. Id.
110. Id. at 1995.
Hathaway is not an international law skeptic; her goal is to understand compliance and to make international law more effective. But her results suggest that human rights treaties have no observable effect on the actions of states; the fact that a human rights norm has been made "law" by its inclusion in a treaty seems to have little effect. Hathaway's results have thus fueled skepticism about the robustness and efficacy of human rights treaties. In their recent book, *The Limits of International Law*, Jack Goldsmith and Eric Posner argue that Hathaway's studies, along with the empirical work of another scholar, demonstrate the weakness of human rights treaties and the limited possibilities of international law and cooperation. According to Goldsmith and Posner, "The bottom line" is "that there is no evidence that ratification of human rights treaties affects human rights practices."

Goldsmith and Posner find other evidence of these treaties' ineffectiveness in the apparent failure of the reporting and complaint regimes the treaties set up. Many of the treaties have relatively undemanding reporting obligations, "yet states do not appear to take seriously their obligation to submit reports." As they explain, "More than 70 percent of parties have overdue reports," "at least 110 states have five or more overdue reports," and "about 25 percent have initial overdue reports." "Perhaps

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111. Hathaway's study is not beyond criticism. Ryan Goodman and Derek Jinks have argued that "Hathaway’s project is in important respects flawed," identifying "(1) defects in Hathaway's research design; (2) structural deficiencies in her theoretical model; and (3) troubling implications of her policy analysis." Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171, 172 (2003). Among other things, they raise concerns over Hathaway's choice of data, in particular, the mechanisms used for measuring human rights violations and how some improvements in human rights practices, such as increasing free speech and accountability, may make negative human rights practices more visible. See id. at 176-78. One might even go further and wonder whether complex questions like human rights practices are really capable of measurement. This Article reaches no conclusion regarding the accuracy of Hathaway's study. What is important here is that these studies seem to support the intuition that human rights treaties are widely disregarded and that these studies provide fodder for arguments about international law's ineffectiveness.


113. Although they do not dismiss these treaties entirely, their discussion takes a highly skeptical tone. See id. at 119.


115. See Goldsmith & Posner, supra note 1, at 120.

116. Id.
the best indication of the failure of this system," argue Goldsmith and Posner, "is that although 1.4 billion people have the formal right under these treaties to file complaints against their governments, there are only about sixty complaints per year." 117

Moreover, state practices in ratifying the treaties imply that states never intended the treaties to impact their behavior. Goldsmith and Posner note that liberal democracies qualified their acceptance of the ICCPR with a myriad of Reservations, Understandings, and Declarations ("RUDs") designed to equate treaty compliance with their current practices. Thus, the United Kingdom attached sixteen RUDs, the United States attached twelve, and France attached eight. Authoritarian states attached few or no RUDs. 118 "This pattern is consistent with [Goldsmith and Posner's] hypothesized reasons that states join the ICCPR: authoritarian states do so because they suffer little cost from their noncompliance, and liberal democracies do so because, after RUDs, they can comply simply by following their prior domestic practices." 119

In a more recent article, Hathaway argues that those gaps between accession and compliance present an even more paradoxical pattern. 120 Rather than finding no correlation between treaty accession and human rights or environmental improvements, 121 Hathaway argues that accession and compliance are inversely related. Looking at statistics related to a number of human rights treaties and environmental treaties, 122 Hathaway finds that the states that are least likely to comply with human rights and environmental norms and that have the weakest domestic institutions to enforce treaty provisions are also those most likely to ratify human rights

117. Id.
118. For example, Algeria attached three RUDs, Syria attached one, and a long list of states, including Belarus, the Democratic Republic of the Congo, Sudan, and Uzbekistan, attached zero RUDs. See id. at 129.
119. Id. at 128. This is consistent with Hathaway's findings that "[h]uman rights and environmental treaties gain adherents at a much faster pace than do comparable trade treaties." See Hathaway, An Integrated Theory, supra note 4, at 515.
120. See Hathaway, An Integrated Theory, supra note 4, at 474 ("In short, the theory not only provides a comprehensive vision of the potential and the limits of international law; it also gives rise to unique (and often counterintuitive) predictions that are consistent with the available evidence.").
121. Citing a study by Beth Simmons on the International Monetary Fund, Hathaway explains that economic treaties appear to follow a different pattern. In those cases, enforcement is more effective, but so too are the benefits of compliance higher. As a result, states that accede to those treaties are more likely to comply. See id. at 519 (citing Beth Simmons, International Law and State Behavior: Commitment and Compliance in International Monetary Affairs, 94 AM. POL. SCI. REV. 819, 822–27 (2000)).
and environmental treaties. Thus, "[n]on democratic nations with worse reported human rights practices appear more likely to have ratified human rights treaties than those with better reported practices." Similarly, "countries that have ratified the Vienna Convention [on the Protection of the Ozone Layer], which established mechanisms for international cooperation to address the effects of ozone-depleting chemicals on the ozone layer, actually produce more chlorofluorocarbons ("CFCs") on average than those that have not." How can this paradox be explained? According to Hathaway, states with worse records and weaker institutions have the most incentive to sign such treaties because they will get the initial reputational benefits of signing but will never be required to comply with the treaties' provisions. Contrastingly, a state with strong domestic institutions may be less likely to sign even if it generally follows the norms described by the treaties for fear that those domestic institutions will actually enforce the treaties' provisions.

The results of these studies are ominous. Those states with the clearest legal obligations under the doctrine of sources appear least swayed to obey, while those with less clear obligations obey as a matter of course. The link between treaty accession and compliance is severed completely.

Law need not be universally followed in order to qualify as law—legal systems presume the existence of lawbreakers—but if the "law" is commonly disregarded and seems to have little impact on action, the meaningfulness of the "law" must be doubted. Perhaps the "law" isn't law at all. Here, the gaps between treaties and compliance are so wide that they undermine faith

123. Id. at 474 ("[H]olding other factors constant, countries with very poor human rights records can be as likely or even more likely to ratify treaties as countries with better records, but that unlike those with better records, they are unlikely to comply with those commitments—which is in fact the pattern found.").

124. Id. at 518–19.
126. As Hathaway explains:
Yet in fact these countries often have stronger incentives (and weaker disincentives) to join human rights treaties than states with better records—first, because such countries usually have weak rule of law and thus create limited opportunities for domestic legal enforcement; second, because human rights treaties usually lack transnational legal enforcement mechanisms, such as supranational enforcement or credible threats of state-to-state retaliation; and finally, because such countries, by displaying their (sometimes insincere) commitment to human rights, increase their standing among other nations, international bodies, private investors, domestic actors, and others and thereby obtain significant collateral benefits.

Id. at 474.

127. Id. at 509–10.
in the international system and international law as a whole. "The collapse of legal rules through violation feeds upon itself, creating a downward spiral and threatening the contagion of other legal rules." If international law is to answer its critics, it must account for these gaps.

III. CHANGING THE RULES OF THE GAME

The traditional doctrine of sources has served international law well over the past century. It has helped provide structure and coherence during a time when international law was expanding rapidly and dramatically. But the doctrine's explanatory power is increasingly being challenged. As mentioned above, some empirical evidence seems to indicate that the presence of human rights (or environmental) treaties has little, if any, impact on state behavior. Even more disturbingly, those states least likely (and least able) to follow human rights treaties may also be most likely to ratify them. If international law is identified with treaties, as the traditional doctrine of sources suggests, and treaties bear, at best, no relationship to state action, can international law really be "law"?

The next two Parts suggest a way to address these challenges. They suggest that the problem lies not with international law as a whole but, instead, with our means of identifying it. As such, they argue that the orthodox doctrine of sources, with its focus on treaties and consent, needs to be replaced. In its place, they suggest a new doctrine of sources focused on the processes by which norms are internalized by international actors. Part III lays the groundwork for this new doctrine by looking at two theories of when and why states obey the laws that they do. Part IV, in turn, uses the insights borrowed from those theories to develop a method for identifying rules of international law. The goal is not to equate law with compliance. Instead, I hope that the new doctrine of sources that emerges will capture which rules are treated as law in the international system and which are not

129. Roberts, supra note 31, at 762 ("Laws must bear some relation to practice if they are to regulate conduct effectively, because laws that set unrealistic standards are likely to be disobeyed and ultimately forgotten. This consideration particularly applies to decentralized systems of law, such as international law, where traditional enforcement mechanisms are unavailable or underdeveloped."); see also Hathaway, An Integrated Theory, supra note 4, at 469.
130. Glennon, supra note 90, at 956.
131. See supra Part I.D.
132. Onuma explains:

Although validity (whether law must be observed), not efficacy (whether law is actually observed), should be the primary concern for lawyers, even a proponent of the pure theory of law admits that the efficacy of law constitutes a condition of the validity of law. If international law were not observed by states at all, the very validity of international law would be lost.

Onuma, supra note 74, at 114 (internal citations omitted).
and bring the international law described by international lawyers closer to the international law recognized by states.

A. FROM CONFLICT TO OBEDIENCE

One response to complaints about the ineffectiveness of international law has been an increased theoretical focus on compliance. These theories have sought to explain why states obey the rules that they do and to understand the conditions that generate compliance with international rules. Gaps between treaty and practice, these theories suggest, are essentially implementation problems. If the rules are written in the right way, if the right advocacy forums are utilized, and if the right enforcement mechanisms are arrayed, states will comply with international law. Such theories have focused on how compliance is generated through the formalized interaction between states in international institutions, rational-choice concerns with state reputation, socialization of states within international communities, the internalization of international norms within domestic legal systems, and the "compliance pull" generated by rules perceived as "legitimate."

This Part looks at two particular theories of why states comply with international law in the absence of effective coercion: Harold Koh's theory of transnational legal process and Thomas Franck's theory of law as legitimacy. The focus on these two theories is not meant as an endorsement of these theories over others. Rather, these theories provide useful illustrations of how international law can be thought of in terms of processes and norms. In explaining why states obey and how law exerts its force, these theories hint at a different way to think about international law's sources. They provide a foundation for a different doctrine of sources based

133. Although these theories employ a variety of methodologies, many of them seem to draw on the insights developed by the Constructivist school of international relations theory. Although these theories generally accept that states act according to their perceived interests, they argue that those interests are shaped by international institutions and norms and by interactions between international actors. The goal of these theories is to better understand those processes of interest construction.

134. CHAYES & CHAYES, supra note 10, passim.

135. Guzman, A Compliance-Based Theory, supra note 6, passim. See generally Andrew T. Guzman, Saving Customary International Law, 27 MICH. J. INT'L L. 115 (2005) [hereinafter Guzman, Saving Customary International Law].


138. FRANCK, THE POWER OF LEGITIMACY, supra note 15, passim; Franck, Legitimacy, supra note 7, at 705.

139. See Franck, Legitimacy, supra note 7, at 705; Koh, Bringing International Law Home, supra note 7, at 626; see also FRANCK, THE POWER OF LEGITIMACY, supra note 15, at 16.
not on formality and consent, but on the internalization of international norms.\textsuperscript{140}

1. Transnational Legal Process

One compliance theory that hints at a different model of international law is Harold Koh's theory of transnational legal process.\textsuperscript{141} Koh's theory describes "the process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internalized into a nation's domestic legal system."\textsuperscript{142} Instead of focusing on the interaction between states at the international level, Koh broadens his view to look at the operation of international rules within the domestic political and legal systems of individual states.\textsuperscript{143} Koh argues that international law obtains its force when its rules and norms become internalized by actors within states themselves.

Drawing on studies of norm internalization in the domestic context,\textsuperscript{144} Koh argues that states come to obey international law through a process of "interaction, interpretation, and internalization."\textsuperscript{145} Essentially, a rule becomes internalized as different international and domestic actors—state officials, legislators, NGOs, courts, bureaucracies, and individual "norm entrepreneurs"\textsuperscript{146}—force interactions with one another over particular suggested rules. These interactions lead to interpretations of the rules that govern future interactions between both the original actors and others.\textsuperscript{147} A

\textsuperscript{140} In studying which laws are complied with and when, it may be important to have a definition of the "law" that is separate and unrelated to one's theories about compliance. Mixing the two might predetermine the study: if law is defined in part by what rules are complied with, a study of compliance will show that laws tend to be obeyed. The goal of this Article, however, is different. This Article does not seek to predict which rules will be followed but, instead, seeks to identify which rules are treated as law in the international system. Theories of compliance should be quite helpful in answering this question of social fact.

\textsuperscript{141} Koh, Bringing International Law Home, supra note 7, at 626.

\textsuperscript{142} Id.

\textsuperscript{143} Id. at 625–27.

Instead of focusing exclusively on the issues of "horizontal jawboning" at the state-to-state level as traditional international legal process theories do, a transnational legal process approach focuses more broadly upon the mechanisms of "vertical domestication," whereby international law norms "trickle down" and become incorporated into domestic legal systems.

\textit{Id.}

\textsuperscript{144} See id. at 627–33. In particular, Koh uses the example of seatbelt rules and the complicated process whereby buckling a seatbelt became an internalized default rule. See id.

\textsuperscript{145} Id. at 626.

\textsuperscript{146} Koh, Bringing International Law Home, supra note 7, at 647. Koh suggests such examples as "Eleanor Roosevelt, Jesse Jackson, the Dalai Lama, Daw Aung San Suu Kyi, and Princess Diana." Id. at 648.

\textsuperscript{147} Id. at 642; Koh, Why Do Nations Obey?, supra note 14, at 2646.
citizens legislature may enact legislation, a court may issue a holding, an executive may issue an order, or a bureaucracy may adopt regulations. The rules increasingly become binding as a matter of domestic law. As these interactions are repeated, adherence to these rules becomes increasingly commonplace, and the rules are increasingly internalized by the actors. “Through this repeated cycle of interaction, interpretation, and internalization—the transnational legal process—international law acquires its ‘stickiness,’ and nations come to ‘obey’ out of perceived self-interest that becomes institutional habit.”  

By domesticating international rules, transnational legal process can spur internal acceptance even of previously taboo political principles. It is worth noting that the internalization of a particular international norm is not the same as acceptance that the norm is right. For some, this process of interaction, interpretation, and internalization may persuade them that the underlying norm is normatively valuable. Others may have no opinion about the value of the rule, following it simply as a matter of habit. Still others may only internalize the fact that the norm is widely accepted by others. They may follow the rule because they have internalized a fear of the reputational harm or other negative consequences that could result from noncompliance.  

The complicated story of the international prohibition against torture and its slow internalization into the American legal consciousness provides a useful illustration of this theory in practice. In 1979, the Filartiga family brought an action in the Eastern District of New York against the one-time Inspector General of the Paraguayan police, Americo Norberto Peña-Irala, for torturing and killing Joeltino Filartiga in Paraguay. With the assistance of human rights NGOs, including the Center for Constitutional Rights (“CCR”), the Filartigas argued that torture was a violation of international law and that the Alien Tort Claims Act (“ATCA”) gave the court jurisdiction.
jurisdiction to hear such cases, even when both the plaintiffs and defendants are foreign citizens.

Although the United States was a party to the Geneva Conventions, which outlawed the use of torture in war,\(^{155}\) the United States had not yet ratified the ICCPR or the Convention Against Torture, the two main treaties prohibiting torture.\(^{156}\) Nonetheless, in a landmark decision, the United States Court of Appeals for the Second Circuit held for the Filartigas.\(^{157}\) Looking at a variety of sources, including the Universal Declaration of Human Rights, various U.N. General Assembly Resolutions, the unratified ICCPR,\(^{158}\) and an amicus brief submitted by the U.S. Departments of State and Justice, the court found that "official torture is now prohibited by the law of nations"\(^{159}\) and that the ATCA gave the federal courts jurisdiction to hear such claims.\(^{160}\)

The *Filartiga* opinion was immediately described as a "landmark"\(^{161}\) and as "an important milestone in the international enforcement of basic human rights."\(^{162}\) It was predicted that the decision would "no doubt . . . appear in textbooks."\(^{163}\) But not everyone agreed with the court's "expansive view of international law,"\(^{164}\) and some worried "that *Filartiga* may be more of an

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158. The use of U.N. declarations and unratified treaties was itself revolutionary and controversial. See Rusk, *supra* note 28, at 311 (criticizing their use).

159. *Filartiga*, 630 F.2d at 884.

160. *Id.* at 887.


aberration than an innovation.” Such negative predictions soon proved untrue. “After an initially ambivalent reception, the Second Circuit’s decision soon attained a strong and diverse following.” Despite some continuing skepticism, its legal principles came to be supported by the “Executive Branch, the American Law Institute, and the American Bar Association.” “In the legal academy, Filartiga met with a similarly warm reception.” Most of all, its logic was slowly adopted by other courts, which agreed that official torture was a violation of international law.

The movement in the academy and courts soon migrated to other parts of the government. By 1990, NGO lobbying helped convince the President and Senate to ratify the Convention Against Torture, and in 1992 the United States finally ratified the ICCPR. Congress took further action in 1992, passing the Torture Victim Protection Act (“TVPA”).

165. Johnson, supra note 161, at 340–41. At least one commentator, skeptical of the Second Circuit’s determination that torture was a violation of international law, wrote:

The decision of the Second Circuit Court of Appeals in the Filartiga case probably will not stand as a landmark case with far-reaching implications for the development of international law. It is more likely to find its place as a legal oddity picked up in “but see...” footnotes by diligent scholars.

Rusk, supra note 28, at 311.


167. Id.

168. Id.

169. See, e.g., Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 717 (9th Cir. 1992) (“[I]t would be unthinkable to conclude other than that acts of official torture violate customary international law.”); Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 942 (D.C. Cir. 1988) (noting the law of nations prohibits official torture); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) (finding that “official torture constitutes a cognizable violation of the law of nations”). Although the three concurring judges in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), rejected the ATCA claim, two of the three wrote that official torture was a violation of international law. See id. at 777, 788 (Edwards, J., concurring); id. at 819–20 (Bork, J., concurring).

Interestingly, the number of courts citing torture as a violation of international law and jus cogens norm has increased in each decade since Filartiga was decided. As a quick illustration, an October 2007 Lexis search in the database “Federal & State Cases, Combined” using the search-terms: “(torture and 'jus cogens') or (torture w/5 'violation of international law')” yields four cases for the first decade following Filartiga, fifty-four cases for the decade after that, and fifty-eight cases for the little more than half decade since 2001. Similarly constructed searches yield similar proportions.

170. See Koh, Bringing International Law Home, supra note 7, at 665 (noting the Senate ratified the convention in 1990).


172. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (2000)). Passed as an amendment to the ATCA, the TVPA was meant both to fulfill the United States’ obligations under the Convention Against Torture and to codify the
and Senate Reports on the bill that became the TVPA expressed "general approval" for Filartiga, explaining that "[w]hile the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad." 

Despite these developments, the Filartiga line of cases remained on unsound footing prior to the U.S. Supreme Court's 2004 opinion in Sosa v. Alvarez-Machain. In that case, the Court declined to specify exactly which international law claims would provide a cause of action and jurisdiction under the ATCA but did endorse both Filartiga's logic and its assessment that torture was a violation of international law actionable under the ATCA. A subsequent congressional attempt to narrow the range of claims under the ATCA would have allowed claims for torture to continue as before.

Second Circuit's decision in Filartiga. Goodman & Jinks, supra note 166, at 513; see also Koh, Bringing International Law Home, supra note 7, at 665–66 (explaining that the TVPA "was designed specifically to supplement and complement the pre-existing scope of the ATCA").


174. Id.


178. Sosa, 542 U.S. at 731 ("The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided Filartiga v. Pena-Irala, 630 F.2d 876 (CA2 1980) . . . "). The Court further noted:

This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. [citing Filartiga, supra, at 890] ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—hostis humani generis, an enemy of all mankind") . . .

Id. at 732; see also id. at 762 (Breyer, J., concurring) (suggesting that the ATCA be limited to a "subset [that] includes torture, genocide, crimes against humanity, and war crimes," for which universal jurisdiction has been established).


Right now, courts are essentially adrift in terms of being able to pinpoint the underlying meaning, scope and intent of the Alien Tort Statute. I hope this legislation will settle the questions that surround this 200-year-old law by providing
As suggested by transnational legal process, this story describes a process whereby the international prohibition against torture is interpreted and internalized through the interactions of different domestic actors. The story begins with the norm entrepreneurs, the Filartiga family, and CCR, forcing the issue into a law-making forum—the federal courts. Through repeated interactions, the rule winds its way from the courts, to the executive, to Congress, and back. After each interaction, the rule seems more natural and more deeply internalized. As Koh explains, the repeated pronouncement of the rule by courts convinced the executive and Congress to ratify the Convention Against Torture. "The key argument made in support of ratification was that the Convention would work no significant changes in U.S. law, which had now significantly internalized the norm against torture."[181]

This type of interaction is repeated multiple times. Congress passed the TVPA to protect and ratify the rights first established in Filartiga. In turn, the Supreme Court turned to the TVPA as proof of the rule's strength.[183] Rather than focusing on the unitary role of the executive in negotiating treaties, the story suggests—as Koh predicts—that political internalization, social internalization, and judicial internalization may move at different paces and in different orders, while at the same time interacting with each other.[184]

Recent debates over torture and the war on terror, although complicating this story, have actually followed the same trends. Revelations of prisoner abuse at Abu Ghraib, Guantanamo, and Afghanistan have brought the United States' commitment to the international prohibition against torture into question. So too have 2002 and 2003 memos prepared by the Bush Administration's Office of Legal Counsel ("OLC") granting the President significant latitude to use coercive tactics[186] and suggesting that

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a reasonable legal means that both plaintiffs and defendants can rely on to litigate their differences.

Id.

180. Id. ("Specifically, the measure would: ... [c]odify international claims under the Alien Tort law to include genocide, torture, slavery and slave trade, extrajudicial killing, and piracy; [and] [c] xpand on existing statutory law, the Torture Victim Protection Act . . . .").


182. See supra notes 172-74 and accompanying text.

183. See Sosa, 542 U.S. at 731 ("Congress, however, has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail.").


the Geneva Conventions did not apply to Taliban and Al Qaeda fighters.\textsuperscript{187} These events, however, should not be observed in a vacuum. As Koh suggests, the State Department and military bureaucracies, those parts of the government that have engaged the prohibition and treaty rules the longest, have fought consistently against the use of coercive interrogation.\textsuperscript{188} The OLC's suggestion that the Geneva Conventions did not apply to the war in Afghanistan met immediate opposition from the State Department,\textsuperscript{189} and the White House eventually announced that although the Taliban and Al Qaeda fighters would not be granted prisoner of war status, the Geneva Conventions would apply to the war in Afghanistan.\textsuperscript{190} The authorization of coercive interrogation tactics met consistent, serious opposition from military lawyers.\textsuperscript{191} By October 2003, a new head of the OLC was already rethinking the previous memos, informing the Defense Department that at least one of the earlier OLC memos was "under review" and could no longer be relied on.\textsuperscript{192} A second "torture" memo was disavowed soon after.\textsuperscript{193}

News of prisoner abuse and torture memos produced similar reactions outside the Administration. The immediate public reaction was highly


\textsuperscript{188} See Koh, \textit{Bringing International Law Home}, supra note 7, at 650–51. As Koh explains:

To avoid such cascading violations, domestic bureaucracies develop "institutional habits" that lead them into default patterns of compliance. These patterns act like riverbeds that channel routine governmental conduct along law-compliant pathways. When a nation deviates from that pattern of presumptive compliance, frictions are created, not just in the particular issue area in which the first deviation occurs, but in the whole spectrum of interlinked issue areas. To avoid such frictions in its continuing interactions, a nation's bureaucracies gain powerful institutional incentives to press their governmental leaders to adhere generally to policies of compliance over policies of violation.

\textit{Id.} at 654–55 (internal citations omitted); see also Barry et al., \textit{supra} note 187, at 32 ("While the CIA could do pretty much what it liked . . . the Pentagon was bound by the Uniform Code of Military Justice. Military officers were routinely trained to observe the Geneva Conventions."). For a recent description of the battle against torture within the U.S. military, see Jane Mayer, \textit{How an Internal Effort to Ban the Abuse and Torture of Detainees was Thwarted}, \textit{NEW YORKER}, Feb. 27, 2006, at 32.

\textsuperscript{189} The State Department's Chief Legal Advisor William Howard Taft IV responded quickly, describing the OLC memo as "seriously flawed" and its reasoning as "incorrect as well as incomplete." R. Jeffrey Smith, \textit{Lawyer for State Dept. Disputed Detainee Memo; Military Legal Advisers Also Questioned Tactics}, \textit{WASH. POST}, June 24, 2004, at A7. Secretary of State Colin Powell "requested that [the President] reconsider that decision," arguing that declaring the Geneva Conventions nonapplicable "will reverse over a century of U.S. policy and practice" and carry "a high cost in terms of negative international reaction." Barry et al., \textit{supra} note 187, at 28–29 (quoting memos from Attorney General Alberto Gonzales and Secretary of State Colin Powell to President George W. Bush).

\textsuperscript{190} Barry et al., \textit{supra} note 187, at 28–29; see also Smith, \textit{supra} note 189, at A7.

\textsuperscript{191} See Barry et al., \textit{supra} note 187, at 32.

\textsuperscript{192} Klaidman et al., \textit{supra} note 186, at 34.

\textsuperscript{193} See \textit{id.}
condemnatory,194 with some even questioning the legal ethics of the Administration lawyers who wrote the memos.195 Congress also reacted negatively. Despite strong opposition from the Vice President and the possibility of a presidential veto,196 Congress eventually passed an amendment to the defense-appropriations bill prohibiting Americans from engaging in torture.197

Throughout, the story remains one of process, of different actors—the White House, the Justice Department, the Pentagon, the State Department, Congress, the media—interacting and debating the prohibition against torture. Through these interactions the rule is defined and internalized.198

Other examples of this process cited by Koh and others include the increased recognition of an international ban on landmines,199 the use of

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197. Eric Schmitt, President Backs McCain on Abuse, N.Y. TIMES, Dec. 16, 2005, at A1; Eric Schmitt, Senate Moves to Protect Military Prisoners Despite Veto Threat, N.Y. TIMES, Oct. 6, 2005, at A22 (“In a sharp rebuke to the White House, the Senate overwhelmingly agreed Wednesday to regulate the detention, interrogation and treatment of prisoners held by the American military.”). The President eventually did sign the amendment into law at the end of 2005 but added a signing statement “that the administration would interpret the amendment 'in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as commander-in-chief and consistent with the constitutional limitations on judicial power.'” Elizabeth Bumiller, White House Letter, For President, Final Say on a Bill Sometimes Comes After the Signing, N.Y. TIMES, Jan. 16, 2006, at A11 (quoting Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005)).

The subsequent passage of the Military Commissions Act is much harder to interpret and may put this story in a more negative light. Although the Act reiterates a ban on torture, it seems to leave the President considerable room to interpret what counts. It also seems to trade a ban on torture for a validation of torture that already occurred. The Act is extraordinarily complicated though, and it is unclear how it has been interpreted by the public. See, e.g., Scott Shane & Adam Liptak, Shifting Power to a President, N.Y. TIMES, Sept. 30, 2006, at A1 (“Public commentary on the bill, called the Military Commissions Act of 2006, has been fast-shifting and often contradictory, partly because its 96 pages cover so much ground and because the impact of some provisions is open to debate.”).

198. Koh's theory also helps explain the messiness of the debate—some rules regarding torture may have been more deeply internalized than others. Thus, although a general prohibition may have been internalized, its full scope may not. For example, non-derogation, a principle recognized in the ICCPR and Convention Against Torture, remains more contested. See, e.g., ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 132–63 (2002).

the Vienna Convention on Consular Rights to force debate over the death penalty,\textsuperscript{200} and the role of NGOs in responding to the mass expulsion of Haitians from the Dominican Republic.\textsuperscript{201}

2. Law as Legitimacy

A different, but perhaps complementary model of international law is suggested by Thomas Franck's theory of law as legitimacy.\textsuperscript{202} Franck has argued that relative compliance with rules of international law results, at least in part, from the perceived legitimacy of particular rules.\textsuperscript{203} The perceived legitimacy of international law rules "will vary in degree from rule to rule and time to time,"\textsuperscript{204} and where particular rules are seen as legitimate, they will exert greater "compliance pull" and be "harder to disobey."\textsuperscript{205}

For Franck, legitimacy is a matter of "right process." Franck identifies four main factors that indicate a rule's legitimacy: "determinacy, symbolic validation, coherence, and adherence (to a normative hierarchy)."\textsuperscript{206} The first, determinacy, involves the clarity and specificity of the rule. A rule's "determinacy depends upon the clarity with which it is able to communicate its intent and to shape that intent into a specific situational command."\textsuperscript{207} States are more likely to follow clear, specific rules, than vague, unclear ones.\textsuperscript{208} Symbolic validation involves the various cues and rituals a legal system uses to indicate the legitimacy of particular rules. It also involves the pedigree of the rule. Essentially, symbolic validation measures the apparent authority invested in the rule and the perceived legitimacy of the rule's birth. Coherence involves treating like cases alike, while adherence measures the extent to which rules fit within an organized system of rules.

One might elaborate on this list to suggest other factors.\textsuperscript{209} Pedigree suggests a role for the perceived fairness of the negotiating process—including, for example, the transparency of the process and participation in


\textsuperscript{202} See generally Franck, Legitimacy, supra note 7.

\textsuperscript{203} Id. at 706 ("This essay posits that, in a community organized around rules, compliance is secured—to whatever degree it is—at least in part by perception of a rule as legitimate by those to whom it is addressed.").

\textsuperscript{204} Id.

\textsuperscript{205} Id. at 708.

\textsuperscript{206} Id. at 712.

\textsuperscript{207} Franck, Legitimacy, supra note 7, at 725.

\textsuperscript{208} Id. at 719 ("When determinacy is absent, it is unlikely that states will have compunctions about not complying with the rule. Indeed, some rules are likely written with low determinacy so that noncompliance will be easy.").

\textsuperscript{209} These are not factors laid out by Franck.
the process—in determining a rule’s legitimacy. Determinacy suggests a role for other factors related to a state’s intent to be bound, including the recognition of enforcement mechanisms within a given treaty.\textsuperscript{210} Greater determinacy generates greater “compliance pull,” at least in part, because clearer, more specific rules demonstrate stronger agreement over the rule to be followed and a greater recognition that noncompliance can be met with reprisals.\textsuperscript{211} Vague rules are easy to argue with, may indicate little agreement about the rule’s content, and, given the difficulty of identifying noncompliance, are difficult to enforce.

The theory can thus explain why newer rules like those described in the ICCPR may generate less compliance than older rules like those governing the rights of ambassadors or jurisdiction over captured ships at sea.\textsuperscript{212} Older rules are likely to have developed both greater determinacy and detail and the pedigree that comes from a long tradition. The scope of newer rules guaranteeing, for example, freedom of speech, might remain less defined.\textsuperscript{213} The theory can also explain why a detailed, heavily negotiated, face-to-face, bilateral trade treaty may generate more compliance than a vague multilateral human rights treaty.

Turning back to the torture example used above, Franck’s theory of legitimacy might help explain why the Geneva Conventions and not the ICCPR or the Convention Against Torture provided such a powerful focal point for arguments against the administration’s positions on torture.\textsuperscript{214} All three prohibit torture, but the Geneva Conventions, negotiated by states to coordinate their actions, possessing a high level of determinacy and a strong pedigree,\textsuperscript{215} and carrying the powerful incentive of reciprocity, seemed to carry much stronger “compliance pull.”

\textsuperscript{210} This would also be true of the enforcement mechanisms associated with a given custom.
\textsuperscript{211} More determinate rules also facilitate compliance by clarifying the actions a government need take or avoid.
\textsuperscript{212} \textit{See} Franck, \textit{Legitimacy, supra note 7, at 717.}
\textsuperscript{213} \textit{See} Gerry J. Simpson, \textit{Is International Law Fair?}, 17 MICH. J. INT’L L. 615, 629 (1996) (reviewing \textit{FRANCK, FAIRNESS, supra note 15}) (“Free speech doctrine in international law is in a similar state, lacking the determinacy and coherence that Franck deems necessary for founding a legitimate and mature rule of international law.”).
\textsuperscript{214} \textit{See} Franck, \textit{Legitimacy, supra note 7, at 718} (describing the rules governing the “treatment of war prisoners” as having a high degree of determinacy).
\textsuperscript{215} A February 2006 Lexis search under “News, All (English-Full Text)” is revealing. A search for the terms “United States” and “Covenant on Civil and Political Rights” and “Torture Memo” yielded eight articles. The terms “United States” and “Convention Against Torture” and “Torture Memo” yielded eighty-five articles. When the same search was run with “Geneva Conventions,” 385 stories appeared. Similarly constructed searches yielded similar results.
3. Toward a New Doctrine of Sources

Although Koh’s and Franck’s theories are different—Franck’s is backward-looking, focusing on the process leading to the enactment of particular rules, while Koh’s theory is set in the present, focusing on how rules can be actively internalized and greater compliance generated—the two theories can be seen as complementary. The legitimating factors cited by Franck involve the perceived legitimacy of particular rules. Together, these factors might be incorporated into Koh’s theory as internalized norms of international rulemaking. Moreover, by explaining how and when states come to accept the legitimacy of international rules, both theories begin to explain that mysterious element of international law, opinio juris. These theories provide a window into the alchemy that converts ad hoc, practical coordination and international moral thinking into international law. As the next part suggests, they may suggest a different conception of international law’s sources, one capable of dealing with the challenges posed in Part II.

IV. A NEW DOCTRINE OF SOURCES?

A. LOOKING FOR LAW IN ALL THE WRONG PLACES

It is time to rethink what actually constitutes law in the international system. The current doctrine of sources tells us that treaties are international law, but empirical evidence indicates that treaties are often poor predictors of state practice.216 Some states ratify treaties but do not fulfill their requirements; others refuse to ratify but scrupulously abide by the treaties’ rules.217 At the same time, changes in the international system have eroded the force of positivism and the theoretical equivalence between treaties and international law.218 The expansion of the international community, the rise of human rights, and the international system’s need to adapt to changing circumstances have all put pressure on the reified role of “treaty” in identifying rules of international law.219

Koh’s and Franck’s theories, described in the previous Part, present a different model.220 They suggest that what gives a particular rule of international law its force is the strength of the norms underlying it.221 The more these norms are internalized by states—or by transnational and

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216. See supra Part II.D.
217. See supra notes 120–27 and accompanying text.
218. See supra Part III.A.
219. See supra Part III.A.1.
220. See supra Part I.A.
221. See Franck, Legitimacy, supra note 7, at 706–12 (explaining how a rule’s perceived legitimacy helps generate compliance); Koh, Bringing International Law Home, supra note 7, at 626–33 (tracing how norm-internalization results in states obeying international law).
domestic actors—the more likely they are to influence state actions.\textsuperscript{222} Where the term "international law" is attached to strongly internalized norms, that term will carry greater weight and authority than where it is not. Although Koh's and Franck's theories are meant to answer questions about how international law exerts its force and why states obey,\textsuperscript{223} they also suggest an alternative model of what the rules are and where to find them. In fact, if these theories are correct and international law exerts its force in the way that they suggest, it would be anachronistic to look for the rules in formal sources like treaties rather than in evidence of norm internalization and process.

This Part draws upon these lessons to suggest a revised doctrine of sources for identifying rules of international law. The traditional hierarchy of (1) treaties, (2) custom, and (3) general principles, with its focus on formal sources and state consent, was designed to explain a turn-of-the-twentieth-century world of few states and state-coordination treaties. It systematized the way international law seemed to work at the time. But in a world marked by a multiplicity of states and human rights treaties with deep implications for the internal affairs of states, that hierarchy and those sources no longer adequately describe how international law works. This Part suggests a revised doctrine of sources capable of capturing both the gaps presented by recent empirical works and the myriad ways in which international law is followed on a daily basis.\textsuperscript{224} Instead of focusing on the presence of formal sources like treaties, this new doctrine of sources focuses on the strength of the norms underlying a particular rule of either treaty or customary international law. The hope is that such a doctrine can explain both why treaties were such strong proxies for international law in Oppenheim's time and why they may no longer be today.

The next few Sections lay out a new hierarchy of sources. They explain the analysis that would be required to determine the presence of an international law rule and how the new doctrine of sources might answer some of the concerns laid out in Part II. Part IV concludes by considering

\begin{itemize}
  \item \textsuperscript{222} This could be either because the actors in question have themselves internalized the norm or because the actors (even if they disagree with the norm in question) know that others with influence or power have internalized that norm.
  \item \textsuperscript{223} See Franck, \textit{Legitimacy}, supra note 7, at 705 (explaining that "[t]his essay attempts a study of why states obey laws in the absence of coercion" and differentiating it from "studies that investigate the sources of normative obligation" and which "focus on the origins of rules—in treaties, custom, decisions of tribunals, \textit{opinio juris}, state conduct, resolutions of international organizations, and so forth").
  \item \textsuperscript{224} See Henkin, supra note 5, at 47; see also Hans J. Morgenthau, \textit{Politics Among Nations: The Struggle for Power and Peace} 250 (2d ed. 1954) ("[T]o deny that international law exists at all as a system of binding legal rules flies in the face of all the evidence."); Franck, \textit{Legitimacy}, supra note 7, at 705 (observing "a pregnant phenomenon: that most states observe systemic rules much of the time in their relations with other states").
\end{itemize}
how the new doctrine of sources would impact different aspects of international law.

B. A NEW HIERARCHY

The new doctrine of sources suggested here focuses on a question of international social fact. It seeks to explain which rules are actually treated as law in the international system. This doctrine thus inverts the usual hierarchy of sources. Opinio juris, previously used only as evidence that customary practice had achieved the status of law, is now the main focus of inquiry and the theoretical touchstone of all international law. Both treaties and custom are subordinate to it, providing evidence of opinio juris's presence. Accordingly, where the orthodox doctrine of sources created a hierarchy of sources based on relative formality and consent, this new doctrine takes a cue from Koh and Franck and focuses on how deeply internalized a particular rule and its legitimacy have become. Instead of focusing on the presence of a treaty or a custom, it looks at the relative strength of the norms undergirding them. The most deeply internalized international norms, those most clearly treated as law, would come first, followed by those rules built on their foundation.

The new hierarchy would look something like this:

1. Core International Law
   a. Process Values
   b. Internalized Norms
2. Legitimated Rules
   a. Legitimated Treaties
   b. Recognized Custom
3. Aspirational International Law

225. In this sense, the doctrine of sources described here is somewhat Hartian, suggesting that the key question in determining what the law is in any instance is what rules are treated as law as a matter of social fact in the international system. See generally H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994) (developing a theory of law based on observation of social fact). The question here is not what doctrine of sources would produce the most legitimate or most normatively appealing law but, instead, what doctrine of sources would most accurately reflect the rules currently treated as law by international actors. See generally Brian Z. Tamanaha, Socio-Legal Positivism and a General Jurisprudence, 21 OXFORD J. LEGAL STUD. 1 (2001) (adapting legal positivism to incorporate a wider variety of social practices into the concept of law). One could start from a different position, asserting a theory of legitimacy or of justice and developing a doctrine of sources best equipped to discover rules that meet those criteria. The rules identified by such alternative doctrines might not be the same as those currently treated as law by states. Although such projects have their appeal and may suggest a normatively preferable conception of international law, they are beyond the focus of this Article.

226. See supra Parts III.A.1–2.
1. Core International Law

The strongest international law under this new hierarchy would be a group of core international norms. That group would consist of two different kinds of customary norms deeply internalized within the international system. The first group would be Process Values. These are rules about making rules. Drawing on Franck's theory of international law as legitimacy, this group would include various deeply internalized norms about how legitimate rules of international law are made. It would include factors like consistency, determinacy, predictability, and fair negotiating process that make a particular agreed-upon rule legitimate. It may also include factors that demonstrate states' intent to be bound, including the seriousness of negotiation and the willingness to accept enforcement mechanisms. The second category of Core International Law would be Internalized Norms—a group of core substantive norms that have been widely and deeply internalized by states and other actors and which might almost be described as a core international morality. Jus cogens norms (e.g., prohibitions on slavery, piracy, genocide, and probably torture) would be included in this group. This group would also include some of the oldest background principles of international law, such as pacta sunt servanda and rebus sic stantibus.

227. Accession of a large group of states known for human rights violations to a human rights treaty without attaching any RUDs might be probative evidence that those states have no intention of being bound, especially where liberal democracies attach many. Cf. Goldsmith & Posner, supra note 1, at 127-28 (drawing similar inferences from patterns of RUDs). The presence of many RUDs may contrastingly indicate a much stronger intent and expectation of being bound.

228. Jus cogens norms are peremptory norms of customary international law that states cannot contract around by treaty. Black's Law Dictionary 864 (7th ed. 1999) (defining jus cogens as "a mandatory norm of general international law from which no two or more nations may exempt themselves or release one another").

229. See Restatement (Third) of the Foreign Relations Law of the United States: Customary International Law of Human Rights § 702 cmt. n (1987) (counting all of these as jus cogens norms); Theodor Meron, International Criminalization of Internal Atrocities, 89 Am. J. Int'l. L. 554, 571 (1995) (discussing "torture, which is widely regarded as a jus cogens norm of general international law"). An important caveat is that although a particular norm may have achieved the status of an Internalized Norm, the scope of that norm may be neither internalized nor uncontested. Torture provides an example. Torture has arguably achieved the status of both jus cogens and an Internalized Norm, but the current debates over it may indicate that the scope of the rule is still undetermined. Various treaties prohibiting torture include non-derogation provisions; debate over possible exceptions to the rule against torture may be evidence that at least that principle has not been internalized. Of course, calls for exceptions to the rule against torture may simply be calls to violate the rule.

230. It might be asked how pacta sunt servanda could survive a relative de-emphasizing of treaties. If treaties are no longer de facto international law, it would seem that the principle that states are bound by their agreements must also suffer. This Article suggests that the gap between treaties and accession is not a failure of pacta sunt servanda but, instead, the result of the growing gap between what treaties require and what states think they are agreeing to do.
2. Legitimated Rules

The next strongest type of international law would be a group that includes Legitimated Treaties and Recognized Custom. Building on Franck's insights about the power of legitimate process, this category would include treaties and custom supported by strong Process Values and, thus, imbued with significant legitimacy. Treaties in this category would have the force of international law because the binding nature of the treaty, arising as it does from fulfilled Process Values, has been completely internalized. Such agreements would count as law, not because of the particular rules they describe, nor because they are treaties, but instead because they exhibit the level of pedigree, determinacy, and seriousness necessary to convince international actors that they were meant to be legally binding. This category would thus include a wide variety of well-known bilateral and multilateral treaties, including the General Agreement on Tariffs and Trade, the Geneva Conventions, and the Vienna Treaty on Consular Relations.

231. Thus, although consent is no longer the theoretical basis for the doctrine of sources, it would be wrong to conclude that states would not be bound by their commitments. Where states have followed Process Values in negotiating a treaty, the new doctrine of sources will treat their ratification as a binding legal commitment.

One could thus introduce an element of consent even within the new doctrine. One could explain Legitimated Treaties as resting on an internalized norm that valid consent to a treaty makes that treaty binding law for the ratifying parties. Process Values could be understood as the elements of valid consent. Although such a formulation has the benefit of hewing closer to ordinary ideas about treaty formation, such a formulation risks confusion regarding the actual role of consent in the new doctrine; thus, this Article avoids its use.

232. Their legitimacy is, thus, not tied to the normative strength of the rules they lay out. In many cases, the subject matter of the treaty may have no normative content at all; the treaty might set out rules for bilateral investment, rules governing the specific treatment of ambassadors, or rules regarding how ships should pass at sea. This is not to suggest that these types of treaties never have normative content. Rules about fair trade, intellectual property, or ownership of local resources may entrench certain normative perspectives; such agreements may even be fraught with disagreements over values. The point, though, is that these treaties are treated as law because of the process behind them and not any normative content they may or may not have.

233. See Franck, Legitimacy, supra note 7, at 717. Franck states:

It happens—by way of contrast—that, in international practice, the rules protecting diplomats, as codified by the Vienna Convention, have a very high degree of specificity, and they are almost invariably obeyed. So, too, are the highly specific rules, in another Vienna Convention, on the making, interpretation, and obligation of treaties. Among other subjects covered by determinate rules that exert a strong pull to compliance and, in practice, elicit a high degree of conforming behavior by states are jurisdiction over vessels on the high seas, territorial waters and ports, jurisdiction over aircraft, copyright and trademarks, and international usage of posts, telegraphs, telephones and radio waves. There is also a high degree of determinacy in the rules governing embassy property, rights of passage of naval vessels in peacetime, treatment of war prisoners and the duty of governments to pay compensation—even if not as to the measure of that compensation—for the expropriation of property belonging to aliens.
would also explain the continuing vitality of the traditional doctrine of
sources and its emphasis on treaties. Many treaties are backed by strong
Process Values, and their binding nature on states has been accepted and
internalized.\textsuperscript{234} For the average treaty, the status of law might be presumed.

This second category would also include a group of Recognized
Custom. These would be customary rules that are backed by strong evidence
of general practice and \textit{opinio juris}, which repeatedly have been recognized
and restated as rules of customary international law. Such rules, like
Legitimated Treaties, would carry powerful pedigrees and high levels of
determinacy. Customary international law on treaty interpretation, the
 treatment of ambassadors, and sovereign immunity would be examples of
rules falling in this category.\textsuperscript{235}

3. Aspirational International Law

The final category would be Aspirational International Law. This
category would include rules found in treaties (or in the rhetoric of
international lawyers) where the norm is not yet backed by \textit{opinio juris} and
where the process leading to the treaty does not exert strong legitimacy pull.
These rules may remain vague, and enforcement mechanisms may seem
weak. Some of the treaties studied by Hathaway, like the ICCPR and the
Convention on the Political Rights of Women, may fit this description.\textsuperscript{236}
Rather than reflecting deeply internalized norms, the rules would reflect
aspirations of some states and other international actors. Nonetheless, these
rules may be evidence that customary international law on the topic is in the
process of crystallizing.

Unlike the separate, self-contained categories of the traditional
doctrine, these three categories are best seen as points along a spectrum.
Many rules may lie somewhere between categories. Moreover, the same
processes that bring a rule into one category can also move it into another.
A rule of Aspirational International Law may become the source of advocacy
eventually leading to the internalization of the norm.\textsuperscript{237} Similarly, even

\textit{Id.} (internal citations omitted).

\textsuperscript{234} In a sense, this is where Process Values and the Internalized Norm of \textit{pacta sunt servanda} meet. The fulfillment of Process Values would create a Legitimated Treaty and bring \textit{pacta sunt servanda} into play. For a related discussion, see \textit{supra} note 231 and accompanying
text.

\textsuperscript{235} In an earlier era, this category might have included widely recognized rules of war, like
the law of prize. See, e.g., David Golove, \textit{Military Tribunals, International Law, and the Constitution:

\textsuperscript{236} See \textit{infra} note 265. Some, myself included, might find relegating treaties like the ICCPR
and the Convention on the Political Rights of Women to this category distressing. The fact that
some of the rules listed in these treaties may not yet be "law" does not, however, deny either
their moral force or the international lawyer’s responsibility to seek their general recognition.

\textsuperscript{237} For an example of how this can occur, see \textit{supra} notes 152–84 and accompanying text.
where Process Values were originally not met, longstanding recognition of a treaty may grant that treaty pedigree, instill it with legitimacy, and in turn, grant it the status of law. A Legitimated Treaty, in turn, may become so deeply a part of international law rhetoric that a previously neutral, non-normative rule within it begins to appear normatively preferred.

C. FINDING INTERNATIONAL LAW THROUGH THE NEW DOCTRINE OF SOURCES

1. Evidence of International Law

As explained above, the key determinant of international law under this new doctrine of sources is the presence of internalized norms. Determining whether a certain rule of international law exists thus requires a careful investigation into the presence of opinio juris. In a sense, the new doctrine described here extends part of the longstanding method for finding customary international law to all international law rules, whether written or unwritten and regardless of the type of source—custom, treaty, or non-binding declaration.

In examining any potential rule of international law, the primary question is whether the rule is or would be treated as law by the international community. The question is not whether the rule is universally followed, nor is it whether every state agrees with the content of the rule. Instead, the question is whether states have generally internalized the presence of international law. Sometimes, the internalization of a norm as a legal rule may involve the state accepting that a certain action is right or wrong. It is sufficient, however, that a state internalizes the fact that an action has become outlawed or legally required. What is required is an internalization of how the rule is treated within the system, not an acceptance of values underlying it. People pay their taxes even if they believe them to be unfair.

238. *See* HART, *supra* note 225, at 229 ("So it is possible, although difficult, to imagine that men . . . might come to attach moral importance to driving on the left instead of the right of the road . . . .")

239. *See supra* Part IV.B.1.

240. It is important to note, however, that although this method would look to opinio juris, it would do so for different reasons than the traditional positivist doctrine would suggest. Whereas earlier doctrine looked to opinio juris as proof of consent—namely that states agreed that a rule was "law"—this method would look to opinio juris as proof of a sociological fact—that states treat the rule as "law." *See* HART, *supra* note 225, at 226 (criticizing the "threadbare" quality of a theory based on consent).

241. *See generally* Guzman, *Saving Customary International Law, supra* note 135 (discussing a reputation-based theory of customary international law). Guzman suggests another useful way to think about this question. He turns the inquiry around, asking not what a particular state thinks about a particular rule, but what a state thinks other states think about a particular rule. *Id.* If a state believes that its actions would be seen as unlawful by other states and could subject it to sanction or rebuke, then that state believes there to be a rule of international law. *Id.*
This question is thus distinct from whether a rule is complied with. The decision whether to comply with a particular rule involves the balancing of various interests, costs, and benefits. The fact that a rule is treated as law should be one factor weighing on the side of compliance. This may be because of a generalized desire to be law-abiding, an internalization of the value of the legal rule, or a fear of the repercussions that may follow if others see the rule as law. Even where these interests are present, however, they may not be strong enough to outweigh other concerns. In the domestic context, many people drive faster than the speed limit. Most, however, likely accept that the speed limit is the law. Instead, their non-compliance is the result of a complicated calculus that includes their desire to get somewhere faster, the relative likelihood of getting caught, and the costliness of a ticket. A similar sort of calculus likely takes place when a state decides to violate a rule of international law to pursue what it believes to be a matter of national security. The question here is whether a rule is playing the role of law in states' calculus, not whether it is eventually followed.

Another important note is that the question is one about the status of the rule across the international community, not in the view of a particular state. As discussed in Part IV.E.2, where a state has been accused of violating a rule of international law, the key question will not be whether that state thought the rule was legally binding (except insofar as it provides clues to international consensus), but whether other states, reflecting international consensus, would treat the rule as legally binding.

Evidence that a rule is treated these ways can be found in a variety of forms and places. A widespread custom, a non-binding declaration, or a treaty may all provide evidence of what is treated as law by international actors. But the doctrine is open to other forms of evidence as well. Norm internalization is a process involving a coterie of different actors including judges, legislators, NGOs, and the media, evidence of their views in domestic and international court decisions, public opinion polls, and media reaction is useful as well. Any evidence of *opinio juris* is probative. Of

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242. See Guzman, A Compliance-Based Theory, supra note 6, at 1883–86.

243. This may be hard to observe, but evidence that a rule is treated as law may be visible in how rules are described and discussed in various contexts. How do states describe the rule when they explain their signature on treaties or when they pass legislation to enact it into domestic law? How do states react to noncompliance with the rule by other states? Do states use legal terms, or more importantly specific legal terms, to describe the violation? Do states use legal arguments to try to explain or excuse what might look like violations of the rule? Are sanctions against a noncompliant state seen as legitimate? Does violating the rule affect a state’s reputation for law-abidingness, making agreements with other states less likely or more difficult?

244. Since the focus is on what states believe the law to be, neither a general course of practice, as traditionally required by customary international law, nor a ratified treaty, as traditionally required by treaty law, is required. Cf. Guzman, Saving Customary International Law, supra note 135, at 149 (“Practice, then, is best viewed as evidence of *opinio juris*.”).
course, some forms of evidence will be more powerful than others in determining whether a rule is ultimately accepted as international law; an official pronouncement will be more probative than a newspaper article.\textsuperscript{245} As Andrew Guzman suggests, "Explicit state action that seems contrary to the short-term interests of a state, and that is accompanied by claims that the state is acting out of a sense of legal obligation, offers strong evidence of \textit{opinio juris}.\textsuperscript{246}" Finding international law will require careful sifting through evidence and careful consideration of its meaning. Admittedly, this is no easy process.\textsuperscript{247}

2. Treaties as Evidence

The most important change under the proposed new doctrine of sources would be in the role of treaties. Treaties would shift from authoritative statements of the law to evidence of what the law requires. The important question would no longer be the presence of a treaty but, instead, the strength and nature of the norms underlying it.

The evidence provided by a treaty could nonetheless be quite powerful. Where Process Values have been strongly fulfilled, the treaty itself will be legitimated and become binding as a matter of international law.\textsuperscript{248} A heavily negotiated, highly specific treaty will be treated as law because of the process that produced it and the qualities it exhibits. Determinate rather than vague rules, clear means for determining violations, and the recognition of particular sanctions regimes within the treaty itself would all be factors which, if present, would suggest a treaty that states would treat as law. So too

\textsuperscript{245} Context matters in determining what evidence will be relevant in any given case. The opinion of non-state actors may have little relevance in finding a rule concerning state-to-state relations. It may be considerably more relevant in finding evidence of consensus on human rights norms.

\textsuperscript{246} Guzman, \textit{Saving Customary International Law}, \textit{supra} note 135, at 154. Other probative evidence would be how a state justifies an apparent violation and how other states react to it. Do states discuss the violation in legal terms? Do they refer to specific legal rules (more probative) or appeal to international law more generally (less probative)? One might also look at international reaction to the threat of sanctions against the offending state. Are such sanctions treated as legitimate?

\textsuperscript{247} \textit{Id.} at 126. As Guzman writes:

> Even if one could resolve the above problems about what counts as practice and the degree of consistency required, there remains the practical problem that observing all relevant evidence from all relevant states will normally be impossible.

> At the most mundane level, few nations document their actions and statements in a way that allows for an investigation of their practices.

\textit{Id.} (citing BYERS, \textit{supra} note 50, at 144 n.119).

\textsuperscript{248} These Process Values are themselves international law because they have been internalized by states and state actors. Accordingly, those rules could themselves change as new rules are internalized and as old ones are forgotten. One could thus imagine a new Process Value developing—for example, that any U.N. General Assembly resolution that passes by a majority vote would be binding—if and when a consensus forms around such a rule.
would evidence that the treaty's provisions had been carefully negotiated and widely understood by the treaty's parties. Many, if not most, bilateral or multilateral economic treaties would probably meet this test. In the absence of evidence to the contrary, the legal status of such treaties might even be taken for granted.

Even where the fulfillment of Process Values seems weaker, the treaty may still provide evidence of what customary international law requires or of an Internalized Norm of the international community. In such cases, one would look at the treaty much as one currently looks at the nonbinding declarations and unsigned treaties discussed in Part II.B. The treaty (1) might be evidence of an attempt to codify custom or Internalized Norms, (2) might be evidence that an Internalized Norm or custom is crystallizing, or (3) may have been the focal point around which an Internalized Norm or custom subsequently formed. The main change from the old doctrine is that this analysis would be necessary even where the relevant states had ratified the treaty.

Where the rules described in a treaty involve Internalized Norms, the treaty would reflect international law (but not necessarily create it). Accordingly, the specific language of the treaty—although evidence of the law's scope—may not be completely determinative of the law's content. The rule described by the treaty may be broader or narrower than the Internalized Norm. Debates over the exact scope of the international prohibition against torture may demonstrate such a phenomenon. Although the main treaties prohibiting torture explicitly forbid any derogation under any circumstances, debate over possible exceptions (e.g. "the ticking time bomb" situation) continues. Such an example suggests that when looking to a treaty for evidence of Internalized Norms, treaty language will need to be considered together with other evidence of opinio juris.

These two possibilities—that a treaty may be legitimated by process or may reflect Internalized Norms—are not mutually exclusive. In some cases, a treaty may result both from strong Process Values and describe an Internalized Norm. The Geneva Conventions and the Vienna Convention on the Law of Treaties may be examples of treaties imbued with powerful pedigree and determinacy that also reflect norms deeply internalized by the international community.
In some other cases, a treaty may be lacking in both Process Values and Internalized Norms. A vague treaty backed by deficient process may describe norms that have not yet been internalized and that remain largely aspirational. Such treaties can become powerful engines of norm internalization; they may also develop pedigree and definition as they are referenced and debated over time. Until that time, however, they will be no more than Aspirational International Law and not properly considered “law.”

3. Treaties, Process, and Change

By converting treaties from statements of the law to evidence of the law, the new doctrine of sources erases much of the difference between treaties and other sources of international law. Under the old doctrine, treaties and custom had been distinct types of international law with their own character, rules, and methodology. Other sources, including non-binding declarations and unratified treaties, were forced uneasily into one or both categories. Under the new doctrine, however, treaties and custom become part of the same phenomenon. Both serve as reflections of opinio juris, evidence of what international society has accepted as law. Moreover, non-binding declarations and unratified treaties fit easily into this group. Different sources may carry different weight—treaties, bringing additional solemnity and potential domestic effects, might provide stronger evidence than other types of documents. Nonetheless, the new doctrine would put all international law sources—custom, treaties, non-binding declarations, and unratified treaties—on one theoretical and methodological continuum.

Treaties and custom would also no longer be distinguished by their ability to change. The new doctrine focuses on process; treaties, instead of standing outside that process, are now part of it. Treaties become data points—snapshots of moments on the formation of international law. Just as customary international law can change as general practice and opinio juris shift, so too can the rules reflected in a treaty. Because the treaties would rely on the underlying norms for their force as law, the rules they describe can change as the norms do. If and when, for example, general practice and opinio juris indicate that the meaning of the U.N. Charter’s prohibition on the use of force has shifted and that an exception has developed to allow humanitarian intervention, the international law will have changed.

253. It is important to note that a treaty could be a Legitimated Treaty even if it contains vague terms if it contains determinate means to define those terms. Thus, for example, a treaty with a vague requirement to protect the environment that also sets up a specific mechanism or body to define the scope of that requirement might constitute a Legitimated Treaty.
254. See supra Part I.A.
255. But see supra Part II.C.
The main difference between a treaty rule and a customary rule would be in the definition and certainty of the rule being changed. Evidence of a change in *opinio juris* would have to be strong enough to overcome the higher level of definition and agreement the treaty might embody. The hurdles to changing a Legitimated Treaty would be particularly high; the whole point of the treaty is to lock-in rules. But one can imagine situations where the regime (not simply the government) or the international system has changed so dramatically that the legitimacy of the process carried out by previous entities should no longer bind present ones.256

Finding evidence of what states "believe" has long been one of the most difficult problems of customary international law.257 So too has the question of how much evidence and how much consensus are needed to demonstrate it.258 This Article does not resolve these issues. Admittedly, importing this uncertainty259 to all of international law may seem unsatisfying or counterproductive. But with this uncertainty also comes subtlety. By focusing on the process by which states come to recognize rules as international law, the new doctrine of sources should better reflect and describe the law actually governing the international system.

D. EXPLAINING THE GAPS

The potential increased accuracy of the revised doctrine of sources can be seen in its ability to answer the challenges presented in Part II.260 The new doctrine moves away from the positivist hierarchy's emphasis on consent, a basis for the law that seems increasingly attenuated as the international

256. See Waldron, supra note 87, at 168–69, 171–72. Waldron suggests that East Germany's post-Cold War argument that it was not bound by the Warsaw Pact and Turkey's post-World War I argument that the capitulations regime no longer reflected international realities are examples of just such changes. See id. at 169 ("To expect that a multilateral security treaty could survive such changes is to live in cloud cuckoo land.").

257. See Guzman, *Saving Customary International Law*, supra note 135, at 157 (explaining that "[b]ecause [customary international law] is formed by state beliefs, which are unobservable, and actions, which can be interpreted in many ways, the process of identifying [customary international law] is difficult and dependent on context" and asserting that "[w]hen this is combined with the lack of a process to explicitly identify [customary international law] rules, there is no way to avoid the vagueness of [customary international law]").


259. Customary international law does carry a certain amount of uncertainty. It is important, however, not to overstate it. States have followed (and courts have identified) customary international law for centuries. Even today, when many areas of international law have been reduced to treaty, courts continue to find new rules of customary international law. See Meron, supra note 258, at 817.

260. See supra Part II.
community expands. Instead it looks to international social fact: what norms have been internalized by the international community and what rules are treated as binding. It brings treaties into the same dynamic process as custom, thereby providing a mechanism for treaty rules to change. Focusing on norm internalization also allows more voices to have a say in what constitutes the law. As international law increasingly reaches into states and touches individuals, so too does the revised doctrine ask how actors within the state approach the rule.

It also helps explain the strange nature of Hathaway’s findings. Noncompliance with treaties by treaty-parties is only one aspect of Hathaway’s findings. What makes Hathaway’s studies both disturbing and interesting is the larger, seemingly perverse patterns of both compliance and noncompliance. The traditional doctrine of sources seems as ill-equipped to explain why the states that ratify treaties fail to follow their rules as it is to explain why the states that do not ratify the treaties do, nonetheless, follow them.

The new doctrine suggested here provides a different model. Seen through its lens, Hathaway’s findings no longer suggest the absence or thinness of international law, as Goldsmith and Posner argue. Instead, Hathaway’s findings suggest a system in which international norms are in the process of crystallizing. Some of the treaties Hathaway studies may not be backed by strong Process Values. They may describe rules that are too vague and may demonstrate little expectation by the parties that their provisions are to be enforced. Critics have at times suggested that the ICCPR and the Convention on the Political Rights of Women suffer from a

261. See generally Hathaway, An Integrated Theory, supra note 4; supra Part II.D.

262. See Goldsmith & Posner, supra note 1, at 107–34. It is not exactly clear which—thinness or nonexistence—they are suggesting. See also Part II.D.

263. As Douglas Donoho argues:

Perhaps the most fundamental weakness in the present human rights normative framework is its continuing textual and interpretive indeterminacy. To varying degrees depending upon the right, the catalogue of rights consists of extremely vague, generally stated principles. Many important rights are described in highly elastic terms such as rights to “equal protection of the law,” “freedom of thought,” “self-determination,” “work,” “just and favorable conditions of work,” “an adequate standard of living,” and prohibitions against “discrimination.” While some degree of abstraction and general language is perhaps necessary to any multilateral human rights treaty, such language provides little textual guidance as to a right’s specific content and meaning.


264. See id. at 840 (“Experience has shown that formal State consensus over such broadly worded human rights standards tells us little about the depth of actual State agreement about such content.”); Franck, Legitimacy, supra note 7, at 719 (“When determinacy is absent, it is unlikely that states will have compunctions about not complying with the rule. Indeed, some rules are probably written with low determinacy so that noncompliance will be easy.”).
fatal lack of determinacy.\textsuperscript{265} At the same time, the treaties in question may describe norms not yet fully internalized within the international system.\textsuperscript{266} The norms they describe may be primarily aspirational at this point.\textsuperscript{267} Accession to such a treaty does not necessarily demonstrate a rule of international law, and non-accession to such a treaty does not repudiate a norm that may be in the process of being internalized even without a treaty.\textsuperscript{268}

The contrasting reactions of authoritarian states and liberal democracies to these treaties may demonstrate what is really going on. At the same time that accession to a human rights treaty by a state that has no intention of complying may show that the treaty rule does not yet have the force of law, the myriad of RUDs and general unwillingness of liberal democracies to join the treaty may indicate that the rule described within the treaty has enough force and has been internalized enough to be taken seriously.\textsuperscript{269} Hathaway's findings present an international law in flux, where


\textsuperscript{266} See, e.g., Kelly, supra note 258, at 491. As Kelly argues:

These broad social forces are transforming domestic attitudes about political rights and women's rights, but there is little evidence that states have accepted the norms associated with individualism and post-modern society as an international legal obligation that limit their domestic choices. It is equally unclear how deeply the attitude of individualism and rights consciousness are, in fact, penetrating these societies beyond the economic elites.


\textsuperscript{267} I do not consider here the extent to which any individual treaty studied by Hathaway may or may not reflect Internalized Norms or be backed by strong Process Values. Some of the patterns she shows reflect only partial acceptance of a norm; others may simply reflect common violation of a rule that is international law. Disaggregating these possibilities would take a very careful study of the history and practice related to each treaty, work that is beyond the scope of this Article. The hoped explanatory power of this revised doctrine of sources is not in explaining all of Hathaway’s findings but in providing an explanation for at least some—an explanation that might better bridge the gap between law and action. Some gaps will and should remain under any explanation; this theory is not intended to equate practice with law.

\textsuperscript{268} For example, see supra notes 152–80 and accompanying text, which describe the Filaritiga story.

\textsuperscript{269} Even if the treaties are backed by few Process Values, the norms they describe are internalized enough that a liberal state may worry that the treaties will provide additional, perhaps determinative, evidence of the rule, increasing the likelihood that those states would be sanctioned for noncompliance. A second issue, hinted at here, is the domestic effect such
various norms are in a constant process of being internalized and where treaties provide a focal point, a mechanism, around which norms can crystallize and be debated.

The new doctrine of sources described here would also do a better job capturing the contours of these findings than two other alternative formulations. One tempting alternative would be to leave the doctrine of sources largely in place but to draw a distinction between human rights treaties and everything else. Although such a distinction might explain some of the gaps reflected by the system, it does not explain why human rights treaties might be different. The revised doctrine of sources seeks to go behind all treaties to see why they would or would not be binding. It tries to find criteria that can be applied to any treaty. One can imagine human-rights treaties backed by strong Process Values, as well as weak, vague economic treaties. In such cases, the human rights treaty would be binding law, but the economic treaty might not. Moreover, treaties do not appear in the binary form of human rights or something else. Instead, treaties lie on a spectrum, each containing fewer or more elements of state coordination and individual rights. Treaties pertaining to humanitarian law, for example, fall somewhere in the middle of this spectrum—on the one hand, coordinating state behavior in war, and on the other hand, embodying normative statements about, among other things, the treatment of captives and the targeting of civilians. Environmental treaties may also contain elements of each.

Another alternative formulation would keep the traditional doctrine of sources in place but redefine “treaty” to include only those treaties backed by strong Process Values. The effect of such a redefinition would be largely the same as the new doctrine suggested here and would have the advantage of doing less damage to current doctrine. The difference between this alternative and the new doctrine described here might even be semantic. To the extent that it is more than a semantic difference, however, such an alternative provides only a piecemeal fix, tightening the definition of treaty but leaving everything that falls outside treaty unexplained and undifferentiated.

The redefinition of the term “treaty” also seems unlikely to remain stable. To the extent that “treaty” remains the probative element, the enhanced fit between identified law and observed practice is likely to be temporary. The same pressures that created the current situation would probably continue. Even in the shadow of a rule that only determinate treaties count, the pressure to find agreement in the face of intractable differences would likely lead to vaguer terms. States that fought for even treaties would have in liberal states. Even in the absence of other Process Values, many liberal states would consider these treaties binding as a matter of domestic law. This raises other issues further discussed infra at note 282.
such a weaker agreement would want to give their work legal imprimatur. The desire to give legal foundation to additional human rights, rights that may not yet be generally accepted, would put similar pressure on the category of treaty to expand.

E. **THE NEW DOCTRINE OF SOURCES IN PRACTICE**

Perhaps the best way to understand the new doctrine of sources proposed here is to look at the effect it would have on various aspects of international law. This Section looks at how this new doctrine would affect (1) international law theory, (2) disputes between states, (3) the direction of state action, and (4) the legislation of new international rights. These are by no means the only areas of international law that such a doctrine would affect, and each of these areas is itself too complicated to be captured fully here. But it is hoped that a quick look at these four areas will provide some sense of how the doctrine would operate and the advantages and disadvantages of adopting it.

1. **The Effect of the New Doctrine of Sources on International Law Theory**

Most of the discussion to this point has focused on the international law theory, and it is in this area that a new doctrine of sources would have the most positive impact. First and foremost, the new doctrine of sources would alleviate some of the pressure created by gaps between the doctrinal international law and the actual practice of states. Observations like those by Goldsmith and Posner and by Hathaway fuel skepticism about international law. The widespread violation of certain high-profile rules of international law casts a shadow over the rest of the field, feeding skepticism of all international law, even those areas where international law is widely followed. "The collapse of legal rules through violation feeds upon itself, creating a downward spiral and threatening the contagion of other legal rules." The new doctrine of sources described here does not equate

270. See supra Part II.B.

271. See supra Part II.D.

272. This seems to be the case with Goldsmith and Posner, for whom examples of noncompliance prove the absence of law, but examples of compliance are belittled as pragmatic coordination by another name. See GOLDSMITH & POSNER, supra note 1, at 120–29.

273. Glennon, supra note 90, at 956 ("Cycles of reinforcement lead to enhanced cooperation, as evidenced by the deepening integration of the European Union; success breeds success. But failure also breeds failure, and disintegration, further disintegration."); see also David P. Fidler, *The Future of the World Health Organization: What Role for International Law?*, 31 VAND. J. TRANSNAT'L L. 1079, 1104 (1998) ("To many people, international law is a weak institution in international relations that usually promises more than it delivers."); Jed Rubenfeld, *Two World Orders*, PROSPECT, Jan. 2004, at 36 ("A second spur to U.S. unilaterism has been a growing scepticism about the agenda of the 'international legal community.' The scepticism is partly due to the proliferation of human rights conventions that are systematically violated by many of the states subscribing to them.").
international law with the practice of states—some noncompliance should be expected even under the new doctrine—but it does seek to bring the definition of international law closer to what states treat as international law. Such a shift refocuses attention away from the smaller area of noncompliance toward the much larger area of compliance. Rather than arguing over whether international law exists at all, scholars can focus on which rules, which regimes, which threats and sanctions, lead to compliance with international law. Such a focus on regime design seems considerably more productive than the never-ending debate over international law’s existence.

Moreover, the new doctrine’s focus on process and how rules come to be treated as international law should also have a positive effect. Although such a focus comes at the expense of clearer decision rules, it should bring discussion of which rules constitute international law more in-line with current scholarship on how international law works. Numerous scholars are currently studying the processes that lead to compliance; the new doctrine of sources described here telescopes those ideas backwards to analyze which rules are actually being treated as law in the international system. Placed in this context, the work of those scholars may have an even greater impact, providing the theoretical foundations for the legal nature of international law.

2. The New Doctrine of Sources and International Dispute Resolution

The question remains: will what might work in theory work in practice? Imagine a scenario in which State A accuses State B of violating international

274. This is an important distinction. Internalization of the fact that a rule is “law” is not the same as choosing to obey the law. A state’s belief that a rule is law affects that state’s calculus in deciding what actions to take. Breaking the law may bring particular consequences—the reputation of being a law-breaker, specific legal sanctions, or even the psychological trauma of knowing one broke the law—but there will be times, perhaps when national security is endangered, when a state will decide that it must risk such consequences.

275. A rule stating that a certain source is international law provides a much simpler decision rule than a rule that identifies the process through which international law forms.

276. See generally CHAYES & CHAYES, supra note 10 (proposing a “managerial” model of compliance that relies on repeated dialogues and interactions between states over rules); FRANCK, THE POWER OF LEGITIMACY, supra note 15 (arguing that state compliance with international law results from perceived legitimacy of particular rules); Franck, Legitimacy, supra note 7 (same); Goodman & Jinks, Socialization and International Human Rights Law, supra note 10 (suggesting that acculturation or socialization, rather than coercion or persuasion, may best explain some state compliance); Guzman, A Compliance-Based Theory, supra note 6 (designing a reputation-based model of state compliance with international law); Guzman, Saving Customary International Law, supra note 135 (same); Hathaway, An Integrated Theory, supra note 4 (arguing that state commitment to and compliance with treaties is a function of transnational and domestic enforcement and collateral consequences); Koh, Bringing International Law Home, supra note 7 (suggesting that states’ compliance with international law results from international law’s rules’ internalization into domestic legal systems); Koh, Why Do Nations Obey?, supra note 14 (same).
In the first instance, assume that the dispute ends up before a court or tribunal. If there is no treaty involved, the analysis under the new doctrine would be much as it currently would be for a claim involving customary international law. The court or tribunal would look for evidence of whether or not the international community has come to treat the rule in question as a rule of international law. The one main difference from current doctrine is that opinio juris, or norm internalization, would be the central inquiry. As Andrew Guzman has suggested in his discussion of a reputation-based theory of customary international law, once opinio juris becomes the central concern, the old requirement of consistent state practice drops away. Custom is useful as evidence of opinio juris—consistent state practice may demonstrate that the norm has been internalized—but so too are statements of state officials, non-binding declarations, and domestic-court decisions. Essentially, this allows for the possibility of "instant custom," customary international law found without much evidence of consistent practice. Courts have already started to deploy such techniques; the new doctrine simply explains why they are theoretically legitimate.

If a treaty (one that State B has ratified) is involved in the dispute, the analysis is more complicated. The first question will be whether the treaty involved is a Legitimated Treaty—whether the treaty has become law through legitimate process. The court or tribunal will look at the treaty's pedigree, the determinacy of the rules, the seriousness of the process of treaty negotiation and ratification, and evidence that the parties intended or should have expected to be bound. The question is not what State B

277. This discussion applies to a court or tribunal applying international rather than domestic law. The situation would be different if it involved a U.S. court analyzing U.S. obligations under a treaty the United States had ratified. Under those circumstances, the treaty would be binding U.S. law under the Supremacy Clause of the U.S. Constitution and would be applied to the dispute. None of the analysis suggested here would be necessary.

278. See Guzman, Saving Customary International Law, supra note 135, at 149–57 ("If states as a group believe there is a legal obligation, this is enough to generate reputational (and perhaps direct) sanctions. The question of practice is not directly relevant to the issue.").

279. Id. at 149.

280. Id. at 157–59.


282. One particularly difficult question raised by the new doctrine of sources is whether different states, by following different paths to ratification of a treaty, may demonstrate different intent to be bound. For example, treaties apply as the law of the land under the U.S. Constitution. Senate approval is also required for ratification. As a result of both, the United States cannot ratify a treaty without investing considerable political capital and without expecting to be bound. If the United States enters into a treaty with a state that does not have
thought it was doing when it ratified the treaty, but what other states would expect of State B given the circumstances. The question is an objective one: whether the process followed by State B would have led other states (some consensus thereof) to believe it was bound and whether other states would have considered a breach by State B to be sanctionable or worthy of rebuke.

If the treaty, or the provision in question, meets these standards of legitimacy, State B will be held bound by its obligations and the treaty will be analyzed to decide the dispute just as it would under current doctrine. As explained above, many treaties involve ordinary attempts at state coordination in areas of trade, investment, or international standards. These treaties will ordinarily be backed by legitimate process and, in the absence of evidence to the contrary, can be presumed to be Legitimated Treaties constituting international law for the ratifying parties.

If, however, the treaty provision seems too vague, or the process behind it too thin to be treated as law in and of itself, the court or tribunal will instead turn to the analysis it would perform in the absence of a treaty, searching instead for evidence of internalized norms and opinio juris. The one distinction is that in this case the treaty in question would provide a focal point around which to center the investigation and would provide at least some evidence from which to work.

Most international disputes, however, are not decided by a court or a tribunal, but by the court of public opinion. In these cases, the new doctrine does little to change what actually happens in practice. In those cases, State A and State B consider whether other states believe State B to have violated international law and whether other states would consider State B's actions worthy of sanction. State B will want to know what sanctions
it can expect from State A or anyone else. Aside from worrying about direct sanctions, it will want to know whether continued violation of the rule in question will jeopardize its reputation for law-abidingness and its ability to make agreements with other states. State A will want to know whether its actions in response to the violation will be seen as lawful for the same reason. Tacitly, State A, State B, and all observing states will be determining whether there is a Legitimated Treaty or whether an internalized norm has been broken.

Under the current doctrine, this analysis can lead to considerable hypocrisy as states decide which laws matter to them rather than whether laws have actually been violated. The main effect of the new doctrine of sources would be to bring assessments of whether the law has been broken closer to assessments of whether State B's actions are sanctionable. Such a shift, by eliminating some of the distinction between law on the books and law that matters, might engender greater respect for international law.

3. The Doctrine of Sources and the Direction of State Action

States and those advising them turn to the doctrine of sources to determine the rules governing their actions and the limits on their choices. At first glance, the new doctrine of sources suggested here appears to make that task more difficult. Treaties would no longer provide the clear answers they did before; it might be harder to say with certainty what international law requires. As a practical matter, however, the changes may not be so dramatic. Particularly in the case of treaties involving vague rules, assessments of the law are already uncertain. In determining what a vague treaty requires, a state considers not just the language of the treaty, but also international consensus on the issue: what actions might be allowed, forbidden, or accepted by the international community. For at least some, what the “law” requires is only the first part of the analysis, followed by an assessment of the effects of violation.

The new doctrine of sources would simply shift the line of inquiry. The subtle analyses now required to determine a rule’s application and scope would now be part of the initial inquiry into what the law requires. Under the new doctrine of sources, assessing the law would require understanding the process of norm internalization. Instead of describing an international law rule with intermittent or uncertain support, the new doctrine might suggest a law in the process of coalescing (or perhaps degrading).

Such a shift in focus, even if only rhetorical, could prove beneficial for international law. Under the current doctrine, an international lawyer is put in the awkward position of advising that the law clearly requires or forbids a

286. A treaty with determinate rules, if backed by other Process Values, should provide as much certainty as any treaty did under the old doctrine of sources.

287. See supra Part IV.C. For potential examples, see supra note 265.
certain action but that violation of that law will be met with indifference. Such advice can only diminish respect for international law. By incorporating international consensus into assessments of what the law requires, the new doctrine of sources would help alleviate this problem. The distinction between what the law requires and what states care about would shrink.

The new doctrine would also encourage both those advising states and those acting on a state’s behalf to see their actions as part of the process of international law-making. Where the law on an issue is still only crystallizing, a state will have to consider the effect its actions will have on how that law develops. A violation of the nascent rule might be ignored, but it might also serve as the trigger that finally galvanizes support for the rule and for sanctioning the offending state. In some cases, the opposite could happen, and the violation could trigger the unraveling of an already weak rule. International lawyers and state actors will have to consider such possibilities.

4. The Legislation of New International Rights

The new doctrine of sources should also help clarify the choices confronting international law advocates. The effects of a new treaty enshrining new rights will have to be considered carefully. Where consensus is strong and a treaty backed by strong Process Values is possible, the new treaty can become a powerful tool in advancing those rights. Enshrined in a Legitimated Treaty, the new right would be part of international law. Where Process Values and consensus are lacking, the treaty may not yet be international law. Nonetheless, such a treaty can provide a powerful focal point for the internalization of a new norm.

But such a treaty can also overreach, outstripping any international agreement on the issue. When that happens, the rights involved may remain nothing more than Aspirational International Law. Such a treaty may even have the opposite effect, giving the title of “law” and “treaty” to something widely ignored. The result of too many such treaties may be a diminishing respect for both those terms.

The new doctrine of sources does not tell international legislators how to navigate between these difficult poles, and it is unclear whether adopting such a doctrine would lead to more or fewer treaties. The possibility that a treaty might be ignored where Process Values are absent may lead some to conclude that treaty negotiations are not worth the trouble. Others may decide that committing crystallizing international norms to writing is an additional step toward norm internalization well worth the effort. The new doctrine clarifies the stakes attached to these choices and the work necessary

288 Sophisticated lawyers likely approximate such advice even under current doctrine.
to give a treaty legal effect, either in making sure Process Values are satisfied in negotiating the treaty or in helping internalize its rules after it is signed.

**CONCLUSION**

The doctrine of sources has played an important role in the development of international law over the last century. It has provided a relatively simple, easy-to-apply method to determine what international law requires. Increasingly, however, the rules identified by that easy-to-apply method seem divorced from the actual practice of states. Accession to treaties requiring civil and political rights seem to have had little impact on repressive regimes like Syria, North Korea, and Zimbabwe. At the same time, new sources—U.N. Declarations and "instant custom"—seem to capture aspects of international law invisible to the traditional doctrine of sources.

This inaccuracy is not just a technical problem. To international law skeptics, the gaps between what international law is said to require and what states actually do is proof that international law is a myth, a rhetorical device, or wishful thinking. As the number of visible violations grows and the gaps between treaty obligation and state practice seem to widen, international law appears increasingly irrelevant. As Jack Straw has observed, "If you have a set of rules which conflict with reality, then reality normally wins."

The new doctrine of sources described in this Article sacrifices some of the simplicity and certainty of the traditional doctrine of sources. In their place, however, it seeks to offer improved accuracy—a better picture of the international law actually governing the international system. By focusing on internalized norms underlying the international system and the process through which states come to treat rules as international law, the new doctrine suggested here may better capture the real force of international law. This new doctrine of sources may suggest an international law that is less broad than that suggested by some international law advocates. Some of the often-violated rules referred to by international law skeptics may not actually be international law. But by focusing on how rules are internalized by international actors, this new doctrine also suggests a deeper, more powerful understanding of international law than is often discussed. Conceived this way, international law can and truly does shape state action.

289. See supra Parts I.A–B.
290. See supra Part II.D.
291. See supra Part II.B.
292. See supra Part II.B.