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Change Without Consent: How Customary International Law Modifies Treaties

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Article

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Rebecca Crooto[†]

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INTRODUCTION

In 1903, Panama ceded its sovereign rights over the Panama Canal to the United States in perpetuity.¹ The 1930 London Naval Treaty required submarines to comply with the contemporary law of war, including the prohibition on neutralizing enemy merchant vessels without having first ensured the safety of their passengers and crew.² In 1945, the United Nations Charter prohibited its members from threatening or using force against another state, save for two limited exceptions.³ And, in 1969, Spain and Morocco concluded a permanent fisheries convention, setting the limit of their territorial seas at twelve miles.⁴

Some of these treaties were bilateral agreements between two states; some were limited multilateral arrangements clarifying the legal rights and duties of a few states; some were general multilateral agreements aspiring to universal participation. Some were meant to be temporary descriptions of the states' respective legal duties; others were intended to be permanent. Some were concluded before the U.N. Charter restructured the international legal order; some afterward—one is the U.N. Charter itself. Their subject matter spans such diverse areas as trade law, the law of armed conflict, and the law of the sea. But for all of their diversity in structure, parties, subject matter, and dates, these treaties have one trait in common: they all include provisions that are difficult to square with subsequent state action. However, this conflicting state action is not critiqued as unlawful; rather, it is accepted and thus apparently acceptable.

Treaties have always had to reconcile two competing interests: stability and flexibility.⁵ The need for stability in treaty regimes, reflected in the

1. Convention for the Construction of a Ship Canal to Correct the Waters of the Atlantic and Pacific Oceans arts. II-III, Pan-U.S. Nov. 18, 1903, 33 Stat. 2234 [hereinafter Hay-Bunau-Varilla Treaty].

2. Treaty for the Limitation and Reduction of Naval Armament art. 22, Apr. 22, 1930, 46 Stat. 2858, 112 L.N.T.S. 65 [hereinafter London Naval Treaty].

3. U.N. Charter arts. 2, 42, 51.

4. Convention sur la pêche maritime entre le royaume du Maroc et l'Espagne, Morocco-Spain, art. 3, Jan. 4, 1969, *reprinted in* NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA 512, 513, U.N. Doc. ST/LEG/SER.B/16 (U.N. Legislative Series 1974) [hereinafter Morocco-Spain Fishery Agreement].

5. Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 353 (2008); *see, e.g.*, Int'l Law Comm'n, Rep. on the Work of its Sixtieth Session, Annex A ¶ 1, U.N. Doc. A/63/10 (2008).

customary rule of *pacta sunt servanda* (“agreements must be kept”), undergirds much of international law and explains states’ willingness to invest energies in concluding treaties.⁶ However, treaty regimes that cannot accommodate the shifting needs of states parties risk becoming irrelevant as circumstances and customs change.

In recognition of this tension, scholars are devoting more time to understanding the relationship between treaties and subsequent state action.⁷ In 2008 the International Law Commission established a Study Group on “Treaties over Time”—since renamed “Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties”—to analyze how subsequent state action affects treaties.⁸ And much ink has been spilled discussing individual treaty provisions now desperately in need of amendment or proposing “adaptive interpretations”—interpretations not immediately suggested by the treaty, but which attempt to reconcile outdated text with actual (or desired) state action.⁹

These efforts focus on traditional methods of treaty modification by mutual consent: through amendment, supersession, and adaptive interpretation. While these approaches are useful, they are also inadequate for addressing all conflicts between treaty text and subsequent state conduct. Formal amendment and treaty supersession require states parties’ explicit and unanimous consent, which will often be politically or practically infeasible to achieve in multilateral treaty regimes. And while adaptive interpretations can resolve many inconsistencies, words are not infinitely elastic. Situations invariably arise where state party conduct cannot be aligned with any plausible reading of the treaty text or when the tacit consent of other states parties cannot be assumed. This Article highlights the possibility of modification by subsequently developed customary international law as an alternative means of treaty evolution.

As a matter of formal doctrine, treaty and customary international law are coequal sources of a state’s international legal obligations.¹⁰ However, most

6. *Pacta Sunt Servanda*, BLACK’S LAW DICTIONARY (9th ed. 2009).

7. See, e.g., TREATIES AND SUBSEQUENT PRACTICE (Georg Nolte ed., 2013); Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INT’L L. 289, 294 (2013); Rahim Moloo, *When Actions Speak Louder Than Words: The Relevance of Subsequent Party Conduct to Treaty Interpretation*, 31 BERKELEY J. INT’L L. 39 (2013).

8. Int’l Law Comm’n, *Summaries of the Work of the International Law Commission: Treaties Over Time/Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties*, http://legal.un.org/ilc/summaries/I_11.shtml (last visited Mar. 29, 2016).

9. Adaptive interpretations are a broader category than “evolutive interpretations.” Evolutive interpretations are grounded on the states parties’ original intent that a treaty provision evolve over time, while adaptive interpretations encompass any reading that reconciles apparently contradictory state conduct with a treaty’s text. Cf. Julian Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation Over Time and Their Diverse Consequences*, 9 LAW & PRAC. INT’L CTS. & TRIBS. 443, 445 (2010) (defining “evolutive interpretation” as occurring when “the developmental interpretation is based on some evidence of the original intention of the parties that the treaty be capable of evolution”); see also Int’l Law Comm’n, Rep. on the Work of its Fifty-Eighth Session, U.N. Doc A/61/10, at 415-16 & nn.1026-27 [hereinafter ILC Fragmentation Conclusions].

10. See *infra* note 273.

international law scholars are consent theorists who believe that these legal obligations are legitimate only to the extent states have consented to be bound by them.¹¹ States explicitly consent to be bound by a treaty, but their consent to customary international law (to the extent it exists) usually must be inferred.¹² Given that explicit consent is superior to tacit consent, consent theorists tend to prioritize treaty law over customary international law.¹³ And, for a host of functional reasons, practitioners and judges tend to favor the *lex scripta*. Between these theoretical and practical bents, most tend to presume that, where the two sources require contradictory outcomes, treaty law will prevail.

This Article challenges that presumption by presenting situations where customary international law has both lessened and expanded states' treaty rights and obligations, thereby supporting the few scholars who have posited—usually in purely theoretical works—that customary international law may modify treaties.¹⁴ By advancing a doctrinal justification for such modification based on *lex posterior*, this Article also contributes to the growing literature questioning whether the legitimacy of the binding nature of international legal obligations can be grounded solely in state consent.¹⁵ This argument is novel to the extent that it presumes that general—rather than universal—acceptance of a new customary rule may be sufficient to work a treaty modification, thereby avoiding the holdout problem inherent to multilateral treaty modification under the Vienna Convention's consent-focused rules (whereby a single state can upset the consensus of the majority).¹⁶

11. See Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939, 941 (2005) (describing the “prevailing theory of validity in international law” as being based on “the classic positivist idea that states are obliged to follow only those rules to which they assent” and noting that such assent may be manifested “through words, or treaties, and deeds, or custom”).

12. See, e.g., BRIERLY'S LAW OF NATIONS: AN INTRODUCTION TO THE ROLE OF INTERNATIONAL LAW IN INTERNATIONAL RELATIONS 49-50 (Andrew Clapham ed., 7th ed. 2012); LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 26-28 (1995).

13. See *infra* text accompanying notes 230-231.

14. See, e.g., ANTONIO CASSESE, *INTERNATIONAL LAW* 154 (2d ed. 2005); NANCY KONTOU, *THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW* 20 (1994); MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES* 58-59 (2d ed. 1997); Michael Akehurst, *The Hierarchy of the Sources of International Law*, 47 BRIT. Y.B. INT'L L. 273, 275 (1974-75); Maarten Bos, *The Hierarchy among the Recognized Manifestations ("Sources") of International Law*, 25 NETH. INT'L L. REV. 334, 337 (1978). Nancy Kontou's book is a welcome exception to purely theoretical works in that she discusses numerous examples of concrete conflicts between treaty and customary international law obligations. Because Kontou subscribes to consent theory, see KONTOU, *supra*, at 20, she and I draw different conclusions. Nonetheless, as evidenced from citations, this Article is heavily indebted to her research.

15. See, e.g., BRIERLY, *supra* note 12, at 50-51; Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 2 (2013); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705, 710-11 (1988); Timothy Meyer, *Collective Decision-Making in International Governance*, AJIL UNBOUND (Apr. 28, 2014, 3:05 PM), <https://www.asil.org/blogs/collective-decision-making-international-governance-agora-end-treaties> (citing scholars, himself included, who argue that the consent requirement for international law-making has declined in importance); Joel P. Trachtman, *Reports of the Death of Treaty are Premature, but Customary International Law May Have Outlived Its Usefulness*, AJIL UNBOUND (Apr. 29, 2014, 1:50 PM), <http://www.asil.org/blogs/reports-death-treaty-are-premature-customary-international-law-may-have-outlived> (noting that the consent requirement for treaties cannot be defended by references to democracy or national autonomy).

16. Cf. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 529 (1993)

Finally, this Article advances the counterintuitive argument that this less consensual basis for treaty modification requires a state to engage in more consensus-respecting conduct. When a state wishes to argue against a traditional understanding of a treaty provision, the usual approach of adaptive interpretation—attempting to reinterpret a treaty’s text to permit an action previously understood as forbidden—actually encourages states to act unilaterally and risk destabilizing the international legal order. In contrast, a state that bases its legal argument on the claim that the treaty has been modified by subsequently developed customary international law will have to identify and engage in coalition-building conduct.

Part I reviews how treaties were historically relatively flexible bilateral agreements concluded against a stable background of default customary international law. While foundational customary norms and bilateral agreements are still the norm, today’s international legal structure is complicated by a proliferation in multilateral treaties and an increasing demand for international regulation of new areas, technologies, objects, actions, and ideas. In the absence of directly relevant treaty law, and in need of reliable guiding principles, states are developing practices standardizing their rights and duties in these new spheres. As a result, treaty text is increasingly running up against conflicting state action and swiftly developing customary international law. Part II describes consent-based means of modifying treaties and concludes that these traditional methods do not legitimately resolve all conflicts between treaty and later-in-time customary international law. Part III demonstrates that the possibility of treaty modification by customary international law has long existed in the international legal structure and evaluates different doctrinal justifications for such modification. Part IV employs the threatened U.S. unilateral use of force in Syria as a case study to tease out the relative benefits and drawbacks of these different means of treaty modification.

I. A NEW INTERNATIONAL LEGAL ORDER

Customary international law and treaty law are the two primary sources of international legal obligations. Sometimes they operate independently, governing particular fields; sometimes they serve as mutually reinforcing regulations; sometimes one fills the other’s lacunae; sometimes they mandate apparently contradictory actions. As this Article is concerned with how customary international may modify treaties, this Part traces how, due to ideological, geopolitical, and technological developments, the relationship between these two sources of international legal obligations has grown more complicated and more prone to conflict.

(arguing that modern problems require “new rules that are binding on all subjects of international law regardless of the attitude of any particular state” to avoid “an exempted recalcitrant state [from acting] as a spoiler for the entire international community”).

A. *The Classic Account*

1. *Stable Customary International Law*

A rule of customary international law is recognized as existing when states generally engage in specific actions (the “state practice” requirement) and accept that those actions are obligatory or permitted (the “*opinio juris sive necessitatis*” element). Thus, unlike custom in many domestic legal systems, which derives much of its authority from its long-standing nature,¹⁷ customary international law has no formal temporal requirement.¹⁸ Instead, a rule of customary international law is authoritative because states generally abide by it in the belief that it is law.¹⁹

That being said, because of the generalized state practice requirement, customary international law was slow to develop in a world of limited communication and sporadic technological advances. Accordingly, historic customary international law comprised long-established, well-known, and relatively fixed rules governing relations among all states. It regulated the recognition of new states and state responsibilities; the exchange of diplomatic counsels and their immunities; the conduct and resolution of wars; the creation, interpretation, and termination of treaties; and other subjects associated with state interaction.²⁰

2. *Flexible Treaties*

Against this background of static customary norms, states concluded

17. Black’s Law Dictionary defines custom as “a practice that by its common adoption and long, unvarying habit has come to have the force of law.” *Custom*, BLACK’S LAW DICTIONARY (9th ed. 2009) (emphasis added).

18. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 7 (7th ed. 2008); KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 59 & nn.30-31 (2d ed. 1993) (citing sources).

19. Most agree that a treaty’s authority—and thus its legitimacy as a source of binding legal obligation—is grounded in states’ explicit consent. Customary international law’s authority, however, is the subject of much academic controversy. The generally accepted view is that both treaties and customary international law derive their normative force from the consent of states: states explicitly consent to treaties, and tacitly consent to new customary international law. See *supra* note 12.

However, scholars are increasingly questioning the orthodoxy that international law must be grounded in state consent to be legitimate. See *supra* note 15. As I agree that international law—and, specifically, customary international law—need not be grounded in state consent, I assume for present purposes that customary international law’s authority derives from its two traditional elements—state practice and *opinio juris sive necessitatis*—and, by extension, from the fact that states treat customary international law as binding legal obligations (likely because they are reasonable and useful solutions to coordination problems). This necessarily circular reasoning has long plagued international law scholars, especially as it will be exceedingly difficult to demonstrate that a state acted in a specific manner out of a sense of legal obligation—both because the state comprises different components and because customary international law arises out of convenient cooperative practices. However, states do abide by customary rules, even when it is against their own immediate self-interest. See *infra* Part III.A.2 (discussing how Germany limited its use of submarines during WWI).

20. See WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 60-61 (1964) (describing customary international law as “the rules of co-existence”). Additionally, “special custom” governs practices among discrete groups of states. See ANTHONY D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 234-35 (1971).

bilateral treaties—written documents memorializing agreements between two states²¹—clarifying their respective legal rights and duties. These treaties were relatively flexible legal regimes: they could be modified or terminated with the consent of states parties,²² by the conclusion of a subsequent, conflicting treaty between the same parties,²³ by the denunciation of one party after a material breach by the other,²⁴ or by a fundamental change in circumstances or other supervening event resulting in the impossibility of performing a promised legal obligation.²⁵ Additionally, certain types of treaties—for example, commercial or trading treaties or treaties of alliance—were generally presumed to allow for unilateral denunciation.²⁶ Accordingly, treaties have long been celebrated as a source of adaptive positive law that reflects states parties' needs.

B. The Modern World

Today's international legal structure is far more complicated. Certain customary rules still serve as background defaults governing many areas of state interaction,²⁷ and the majority of new treaties are still bilateral. But two factors—the rise of multilateral treaties and swiftly developing customary international law—have changed the dynamic between treaty and customary international law, resulting in treaties sometimes being the fixed backdrop against which new state practice and norms develop.

1. Constitutive Treaties

The past century has seen a dramatic rise in multilateral treaties—treaties

21. Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. Many of my characterizations of bilateral treaties are equally applicable to limited multilateral agreements—agreements between a limited number of states setting forth their specific rights, duties, and obligations vis-à-vis each other. In contrast to constitutive multilateral treaties, these limited multilateral agreements are more akin to contracts and do not aspire to universal participation.

22. See VCLT, *supra* note 21, arts. 39, 54. Although the Vienna Convention is a product of the modern international legal order, most of its provisions regarding the modification, suspension, or termination of treaties were grounded in existing, albeit confused, customary law. See Karl Zemanek, *Vienna Convention on the Law of Treaties, Introductory Note*, UNITED NATIONS AUDIOVISUAL LIBR. OF INT'L L. 1-3 (2009), <http://legal.un.org/avl/pdf/ha/vclt/vclt-e.pdf> (discussing which articles were codifications of the existing customary international law of treaties).

23. See VCLT, *supra* note 21, art. 59.

24. See *id.* art. 60.

25. See *id.* arts. 61, 62.

26. See, e.g., G. Fitzmaurice (Special Rapporteur), *Second Report on the Law of Treaties*, Int'l Law Comm'n 16, 22, U.N. Doc. A/CN.4/107 (Mar. 15, 1957).

Whether there ever was a customary right permitting states to unilaterally withdraw from or denounce all treaties, however, is a subject of much debate. Compare Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 204 (2010), with Lea Brilmayer & Isaias Yemane Tesfaldet, *Treaty Denunciation and "Withdrawal" from Customary International Law: An Erroneous Analogy with Dangerous Consequences*, 120 YALE L.J. ONLINE 217 (2011), <http://www.yalelawjournal.org/forum/treaty-denunciation-and-qwithdrawal-q-from-customary-international-law-an-erroneous-analogy-with-dangerous-consequences>.

27. See Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 116 n.1 (2005) (noting that "the law of state responsibility, foreign direct investment, the jurisdiction to apply law, diplomatic immunity, human rights, and state immunity" are currently "governed wholly or partially" by customary international law).

concluded by multiple countries that often aspire to universal participation. As early as the 1920s, scholars were recognizing that there were “an increasing number of multilateral treaties.”²⁸ According to one study, eighty-six multilateral treaties were concluded in the century between 1648 through 1748—but more than two thousand such treaties were concluded in the twenty-five years between 1951 and 1975!²⁹ This proliferation might be traced to a growing conviction that certain global problems—including combating the training and financing of transnational terrorist organizations, minimizing human-driven climate change, and reducing the development or use of weapons of mass destruction—are best addressed through global solutions.³⁰

Whereas bilateral treaties resemble domestic contracts, multilateral treaties often play a more constitutive role in the international legal structure, usually by codifying norms or setting standards. Thus, they are often characterized as “law-making” treaties.³¹ As Judge Alvarez noted with regard to the Genocide Convention, certain multilateral treaties “have a universal character; they are, in a sense, the *Constitution* of the international society, the *new international constitutional law*.”³² The U.N. Charter in particular is often analogized to—or even said to be—a global constitution.³³

Constitutive multilateral treaties are difficult to modify, and thus may not reflect new needs of their constituents.³⁴ As traditionally understood, treaties can be modified only with the consent of the states parties. Thus, as the number of parties to a treaty increases, the likelihood of substantively altering its text by mutual consent decreases exponentially. Additionally, many bilateral strategies of inducing treaty modification are either ineffective or inapplicable in the multilateral context.³⁵ The enduring quality of constitutive multilateral treaties can be seen as a benefit: it underscores the binding strength of the treaty

28. Quincy Wright, *The Interpretation of Multilateral Treaties*, 23 AM. J. INT'L L. 94, 95 (1929).

29. Charlotte Ku, Exec. Dir., Am. Soc'y of Int'l Law, Global Governance and the Changing Face of International Law (June 16-18, 2001), in 2 ACAD. COUNCIL U.N. SYS. REP. & PAPERS 1, 5 (2001). Recently, however, multilateral treaty-making has declined; this may be because “the low-hanging fruit of international cooperation has been harvested.” Trachtman, *supra* note 15.

30. Multilateral treaties are considered to be an ideal solution to these issues for a variety of reasons. See Blum, *supra* note 5, at 363 (“[M]odern multilateral treaty-making could be viewed as more participatory, more transparent, more democratized, and hence more legitimate than traditional bilateral diplomacy.”). But see *id.* at 358-60 (questioning whether certain global problems might not be better addressed through bilateral treaties or limited multilateral agreements).

31. See L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 654 (Ronald F. Roxburgh ed., 3d ed. 1920).

32. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 15, 51 (May 28) (Alvarez, J., dissenting); see also JAN KLABBERS, ANNE PETERS & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009).

33. See, e.g., Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998); Blaine Sloan, *The United Nations Charter as a Constitution*, 1 PACE Y.B. INT'L L. 61, 61-62 (1989).

34. U.S. constitutional law scholars will recognize this as the Article V problem. See WILLIAM N. ESKRIDGE, JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 25 (2010).

35. See *infra* Part II.A-B.

and justifies states' high initial investments during the drafting process. However, as time passes and new customs and norms develop, these static texts risk becoming outdated.

To some extent, careful crafting may lessen this problem. During the treaty negotiations, states may employ a number of techniques to introduce flexibility into the treaty regime, including building in procedures or routes by which the treaty may be updated without threatening its overarching structure.³⁶ Drafters might also designate an authoritative interpreter of the treaty to resolve future disputes regarding the text's meaning.³⁷ After the treaty has taken effect, states may engage in other forms of lawmaking: they may propose gap-filling adaptive interpretations,³⁸ conclude related bilateral agreements,³⁹ or employ a variety of soft law mechanisms to clarify their treaty rights or obligations.⁴⁰ But these coping mechanisms do not solve the problem of subsequent state conduct that directly contradicts treaty law—conduct that may swiftly develop into contradictory customary international law.

2. Contemporary Customary International Law

Due both to a need for new regulations and technological and political developments that allow customary international law to develop swiftly, new customary international law is now forming at an unprecedented rate.

First, technological and ideological advances have led to an escalating need for international regulation over new areas, objects, practices, and ideas—and the need for regulation is spurring the creation of new customary international law.⁴¹ New technology has opened previously inaccessible regions—outer space, inhospitable deserts, and the deep sea bed—to exploitation. Drones, cyber capabilities, and autonomous weapons systems are challenging fundamental precepts of the law of armed conflict.⁴² Entire new fields of international law—international trade law, international human rights

36. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 76-77 (1991) (discussing specific strategies); Brian Israel, *Treaty Stasis*, AJIL UNBOUND (May 8, 2014, 2:40 PM), <http://asil.org/blogs/treaty-stasis-agma-end-treaties>.

37. See *infra* Part II.C.2.

38. See *infra* Part II.C.

39. Israel, *supra* note 36.

40. See *id.*; Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725, 740-43 (2012) (discussing U.S. practices with regard to “nonlegal understandings,” “layered cooperation,” and “diplomatic law talk”).

41. For example, customary international humanitarian law is flourishing. In response to the proliferation of noninternational armed conflicts, and in contrast to the pre-1990 legal order, “it is now widely understood to exceed the scope of the [international humanitarian law] treaties.” Monica Hakimi, *Custom's Method and Process: Lessons from Humanitarian Law*, in *CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 148, 154 (2016). But see Joel P. Trachtman, *The Growing Obsolescence of Customary International Law*, in *CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 172, 172 (Curtis A. Bradley ed., 2016) (arguing that customary international law cannot effectively address either longstanding or modern challenges to the international legal order).

42. See, e.g., Rebecca Crootof, *The Killer Robots Are Here: Legal and Policy Implications*, 36 CARDOZO L. REV. 1837 (2015) [hereinafter Crootof, *Killer Robots*]; Rebecca Crootof, *War Torts: Accountability for Autonomous Weapons*, 164 U. PA. L. REV. (forthcoming 2016), <http://ssrn.com/abstract=2657680>.

law, and international criminal law—have sprung up, and legal fields once deemed to be matters of domestic law—intellectual property, investment, and environmental law—are increasingly seen as appropriately regulated by international law.

In the absence of directly relevant treaty law, and in need of reliable guiding principles, states are developing practices standardizing their rights and duties in these new spheres. In most cases, states will justify their actions as lawful under adaptive interpretations of broadly related treaty text. However, existing treaty regimes may not address or anticipate the full range of situations. For example, the majority of cyberattacks do not rise to the level of an “armed attack” and are not governed by the law of armed conflict,⁴³ and other treaty regimes only partially regulate their many possible forms and uses.⁴⁴ As state action in these ungoverned areas evolves and comes to be understood as obligatory, it will harden into new customary international law that might clarify or contradict existing treaty language. In some situations, state action may emerge that is practically appropriate to the situation but might appear to be in conflict with the relevant treaties. Such practice may initially be considered unlawful, but as it is accepted by more and more states, it can harden into subsequently developed customary international law.

Additionally, customary law may now form at a far faster rate. Whereas information once traveled between states by foot, horse, or sail, the Internet and other improved communication technologies now allow states to receive news and react almost instantaneously to other states’ actions. The greater dissemination of information also makes it easier for policymakers to identify evidence of state practice or *opinio juris sive necessitatis* and thereby argue that a given approach comports with an existing or developing custom.⁴⁵ Growing global interdependence and mushrooming international institutions, which foster information sharing and cooperation, have encouraged additional state interactions—which, in turn, results in more evidence of state practice and *opinio juris sive necessitatis*.⁴⁶ Furthermore, states are no longer the only international lawmakers: thanks in large part to technological developments,⁴⁷ both intrastate and nonstate actors are playing an increasingly influential role in the creation of customary international law.⁴⁸

43. Oona A. Hathaway, Rebecca Crooto, Philip Levitz, Haley Nix, Aileen Nowlan, William Perdue & Julia Spiegel, *The Law of Cyber-Attack*, 100 CALIF. L. REV. 817, 840 (2012).

44. *Id.* at 873.

45. Colin Picker, *A View from 40,000 Feet: International Law and the Invisible Hand of Technology*, 23 CARDOZO L. REV. 149, 198 (2001).

46. See Robert O. Keohane & Lisa L. Martin, *The Promise of Institutional Theory*, 20 INT’L SEC. 39, 42 (1995).

47. Picker, *supra* note 45, at 197-201.

48. See, e.g., Hakimi, *supra* note 41; Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT’L L. 119 (2007); W. Michael Reisman, *Canute Confronts the Tide: State Versus Tribunals and the Evolution of the Minimum Standard in Customary International Law*, 30 ICSID REV. 616, 619-21 (2015); Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT’L L. 107 (2011). Indeed, some nonstate actors may be more influential than states, as they are not perceived as advancing a nationalistic agenda. Hakimi, *supra* note 41, at 164.

As a result of these technological and political developments, customary international law can now develop relatively quickly.⁴⁹ The customary international law of the sea, for instance, changed dramatically in the twentieth century. Over the course of a few decades, the common understanding of where a coastal state could exercise its sovereign right to exclude others from fishing shifted from three, to twelve, to two hundred nautical miles from its shore.⁵⁰

* * * * *

Historically, stable customary international law governed interactions between all states, while treaties tended to be malleable bilateral agreements regulating specific relations between two states parties. The proliferation of multilateral treaties and the rise of swiftly developing customary international law, however, have altered the international legal landscape. As constitutive multilateral treaties are harder to modify, they risk obsolescence. In contrast, as growing global interdependence and technological advancements allow for increased state interaction, customary international law is developing at an unprecedented rate and is increasingly likely to conflict with relatively static treaty law.

II. MODIFICATION BY MUTUAL CONSENT

Treaties largely derive their authority as sources of legal obligations from state consent; accordingly, they may always be modified (or terminated) with the consent of their states parties. After reviewing consent-based approaches to treaty modification, this Part concludes that these traditional methods do not legitimately settle all conflicts between treaty and later-in-time customary international law.

Doctrinally, modification by consent may take various forms: formal amendment, treaty supersession, or amplification by associated protocols. As these methods require states parties' explicit consent, they are clearly legitimate means of treaty modification. However, they are also the most difficult to effect for multilateral treaty regimes, where a single state's refusal to consent may thwart a much-needed alteration.

When modification by explicit mutual consent is not an option, adaptive interpretations—interpretations not immediately suggested by the text of the treaty but that attempt to reconcile its text with subsequent conflicting state action—provide an alternative means of updating aging treaty text. But while

49. What I term "contemporary" customary international law still requires both evidence of state practice and *opinio juris sive necessitatis*. It should be distinguished from what some scholars call "modern" or "instant" customary international law, which is criticized for being less tied to state practice. For a description of how "instant" custom may arise, see Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23, 45 (1965) ("International customary law requires only one single constitutive element, namely, the *opinio juris* of States."), reprinted in INTERNATIONAL LAW: TEACHING AND PRACTICE 237, 260 (Bin Cheng ed., 1982). For critiques of "modern" customary international law, see, for example, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 839-40 (1997); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 83 (1992).

50. See KONTOU, *supra* note 14, at 37-40.

adaptive interpretation can resolve many inconsistencies, words are not infinitely elastic. As new norms become widely accepted, certain inflexible treaty obligations will appear progressively more absurd or impractical, and proposed interpretations attempting to resolve discrepancies between treaty law and state action will appear less plausible and convincing.

A. Formal Amendment

In 1991, the United States and Czechoslovakia signed a bilateral investment treaty (BIT).⁵¹ After Czechoslovakia was dissolved in 1993, the BIT continued in effect for its successor states of the Czech Republic and Slovakia. In 2004, after the Czech Republic became a member of the European Union, it was required to take "all appropriate steps to eliminate incompatibilities between the Treaty Establishing the European Community and its other international agreements," including its BIT with the United States.⁵² Accordingly, that same year the Czech Republic and the United States amended their earlier BIT to reduce the possibility of conflicts between it and European Union laws.⁵³

In 2001, states parties gathered for the Second Review Conference on the Convention on the Use of Certain Conventional Weapons (CCCW), which regulates the use of certain weapons in international armed conflicts.⁵⁴ Based on a U.S. proposal, the states parties agreed to amend Article 1 of the framework Convention to make it and the (then-existing) first four associated protocols equally applicable to noninternational armed conflicts.⁵⁵ No state opposed this extension of the treaties' scope, largely in recognition of the fact that the extension of the law of war to noninternational armed conflicts was "an important and necessary development of international humanitarian law."⁵⁶

Ideally, any necessary treaty modifications would be similarly addressed

51. Treaty Between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment, Oct. 22, 1991, Czech. & Slov.-US., S. TREATY DOC. NO. 102-31.

52. Additional Protocol Between the United States of America and the Czech Republic to the Treaty between the United States of America and the Czech and Slovak Federal Republic Concerning the Reciprocal Encouragement and Protection of Investment of October 22, 1991, pmbl., Czech. & Slov.-U.S., Dec. 10, 2003, S. TREATY DOC. NO. 108-18 (2004).

53. *See id.*

54. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects, Oct. 10, 1980, S. TREATY DOC. NO. 103-25, 1342 U.N.T.S. 137. This framework Convention is augmented by five protocols, governing the use of weapons causing injury by fragments not detectable by X-ray; mines, booby-traps, and other such devices; incendiary weapons; blinding laser weaponry; and weaponry with explosive remnants of war.

55. Amendment to Article I of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects, Dec. 21, 2001, S. TREATY DOC. NO. 109-10, 2260 U.N.T.S. 82. The Fifth Protocol, which was concluded in 2003 and took effect in 2006, applies to both international and noninternational armed conflicts, in accordance with the amended Article 1. *See* Protocol on Explosive Remnants of War, Nov. 28, 2003, S. TREATY DOC. NO. 109-10 (2006).

56. Louis Maresca, *Second Review Conference of the Convention on Certain Conventional Weapons*, 84 INT'L REV. RED CROSS 255, 256 (2002).

by the states parties through the treaty's formal provisions for amendment. Modern treaties often have sections detailing their amendment procedures; in the absence of such a provision, the general rule is that treaties may be amended if all states parties so agree.⁵⁷ However, for a variety of reasons, this will be more difficult to effect in a multilateral than in a bilateral treaty regime.

First, two states will be more likely to agree to a treaty modification than will numerous states. Moreover, a state wishing to modify a bilateral agreement has far greater power over its treaty partner than a state wishing to modify a multilateral treaty. Because a state can threaten to breach (and thereby possibly terminate) a bilateral agreement, it can coerce its partner to agree to certain modifications. As in domestic contractual law, there will be situations where the nonbreaching party would prefer a modified performance to nonperformance and therefore will assent to altering the original agreement. This threat carries less weight in multilateral situations, as one party's breach will rarely threaten the existence of the treaty regime.⁵⁸

Second, it is perhaps obvious to observe that multiple states will be more likely to agree on insignificant changes than on significant ones. Although the U.N. Charter is widely criticized as imperfect,⁵⁹ after almost seventy years of existence and dramatic shifts in the international order, it has been formally amended only five times—and each modification was a relatively minor one, required by the significant growth in U.N. membership.⁶⁰ Nor are even the most mundane proposals for amendments easily passed. States, reevaluating their interests, may hold up necessary alterations in the hopes of renegotiating other, more significant points.⁶¹

Additionally, multiple states are more likely to agree on changes reflecting well-established norms than on more controversial ones. For example, the CCCW states parties were able to agree on amending Article 1 in large part because the norms prohibiting the use of excessively injurious weapons or weapons with indiscriminate effects have become so well entrenched. But even well-established norms are rarely universally accepted: although no state formally opposed Article I amendment to the CCCW, only 82

57. See VCLT, *supra* note 21, arts. 39–40.

58. See Laurence R. Helfer, *Terminating Treaties*, in THE OXFORD GUIDE TO TREATIES 634, 635 & n.7 (Duncan B. Hollis ed., 2012) (discussing exceptions to this general rule, such as when the multilateral agreement specifies that it will not remain in force should the member states drop below a specified number).

59. See, e.g., U.N. Secretary-General, *A More Secure World: Our Shared Responsibility*, Rep. of the High-Level Panel on Threats, Challenges and Change, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004).

60. In 1965, the Security Council was increased from eleven to fifteen members and the required supermajority for affirmative decisions was increased from seven to nine votes. The same year, the U.N. Economic and Social Council was increased from eighteen to twenty-seven members. In 1968, Article 109 was amended to account for the earlier modification to the required supermajority vote. Finally, in 1973, the U.N. Economic and Social Council was increased again, this time to fifty-four members. *Charter of the United Nations, Introductory Note*, UNITED NATIONS, <http://www.un.org/en/sections/un-charter/introductory-note/index.html> (July 28, 2014).

61. Israel, *supra* note 36.

of the 122 states parties have adopted it.⁶² Forty countries—including Israel, Pakistan, Saudi Arabia, Uganda, Uzbekistan, and Venezuela—do not recognize the applicability of the CCCW and its protocols to internal armed conflicts.⁶³

Finally, precisely because they create beneficial constitutive law, states may be reluctant to amend multilateral treaties. Amendment risks fragmentation, insofar as some states and not others might agree to the alteration. As “[t]he move from a single set of rules for a given domain to different rules in force between different States may diminish the stability, clarity, and gravitational pull of the regime,”⁶⁴ states reliant on the original treaty may not wish to improve it, given that doing so risks undermining its overall force.

B. Treaty Supersession and Additional Protocols

Changes in state action led to the customary international law of the sea evolving swiftly in the twentieth century. In the 1700s, a coastal state’s territorial sea was considered to be three nautical miles from its shore—roughly the distance a canon could fire. In this zone, states could exercise traditional sovereign rights, including the power to exclude other nationals from fishing; beyond was the high seas, open for exploitation to nationals of any state.⁶⁵ During the twentieth century, however, states increasingly claimed exclusive fishing rights in areas beyond the three-mile limit, usually citing the need to conserve or avoid overexploiting their fishery resources. On the basis of this evolving state action, in 1974 the International Court of Justice (ICJ) held that states enjoyed a twelve-mile exclusive fishery zone under customary international law.⁶⁶ Less than a decade later, the 1982 Law of the Sea Convention provided for a 200-mile exclusive economic zone, within which the coastal state had an exclusive exploitation right, at least up to its capacity to harvest.⁶⁷ Shortly thereafter, the ICJ recognized the 200-mile zone as a new rule of customary international law, binding on all states (including those that did not join the Convention).⁶⁸

This evolving customary international law affected numerous fishery

62. Compare Amendment to Article I of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg_no=XXVI-2-c&chapter=26&lang=en (last visited Mar. 30, 2016), with Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mdsg_no=XXVI-2&chapter=26&lang=en (last visited Mar. 30, 2016).

63. See sources cited in *supra* note 62.

64. Israel, *supra* note 36.

65. See AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 178 (7th rev. ed. 1997).

66. Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. 3, ¶ 52 (July 25).

67. United Nations Convention on the Law of the Sea arts. 57, 62(2), Dec. 10, 1982, 1833 U.N.T.S. 397.

68. Continental Shelf (Tunis. v. Libya), Judgment, 1982 I.C.J. 18, ¶ 100 (Feb. 24) (observing that the 200-mile exclusive economic zone “may be regarded as part of modern international law”).

treaties. For example, based on a 1904 Convention with Great Britain, France enjoyed the right to fish in certain Canadian territorial waters.⁶⁹ In recognition of France's historic fishing rights, Canada exempted France from its 1964 Territorial Sea and Fishing Zones Act,⁷⁰ which claimed a territorial sea of three nautical miles and an additional exclusive fishing zone extending for another twelve nautical miles.⁷¹ However, in 1972, in recognition of the changed customary law, Canada and France signed a new agreement phasing out French fishing rights.⁷²

If states conclude a treaty that directly contradicts an earlier treaty between the same parties, the conflicting provisions in the earlier agreement are considered terminated.⁷³ This practice of law invalidation by subsequent law is called supersession, and it provides an alternative means of modifying both bilateral and multilateral treaties by mutual consent. However, for much the same reasons discussed with regard to formal amendment procedures, treaty modification through supersession is far more effective in bilateral than in multilateral treaty regimes. Traditional methods of pressuring treaty partners into altering their legal obligations are less effective, multiple states are unlikely to agree on needed substantive changes, and augmentation risks fragmentation.⁷⁴

States have attempted to address the difficulty of modifying multilateral treaties by mutual consent through a practice that is distinct from, but related to, supersession. Instead of concluding a contradictory treaty, states in an overly broad or aging multilateral regime may create additional augmenting or amplifying agreements, often termed "Protocols." A state may ratify the original agreement, the additional protocols, both, or neither.

One benefit associated with the possibility of superseding protocols is that states negotiating a multilateral agreement may table the most controversial questions for a later date. States may conclude a relatively low-cost and nonthreatening framework treaty, which in turn may encourage awareness of the issue and the evolution of pertinent norms. As those norms evolve over time and become clarified or more established, they can provide greater support for subsequent protocols than existed when the original agreement was drafted.⁷⁵

However, by putting off certain controversial decisions in the interest of

69. Convention Between Great Britain and France, Respecting Newfoundland, and West and Central Africa, Fr.-Gr. Brit., Apr. 8, 1904, *reprinted in* 97 BRITISH AND FOREIGN STATE PAPERS 31 (1903-1904); *see also* KONTOU, *supra* note 14, at 51-54 (describing the evolution of Canada's fishing agreements with France).

70. Coastal Fisheries Protection Act, C. Gaz., pt. II, vol. 98, SOR/1964-275, P.C. 1964-1112, Aug. 12, 1964 (Can.), *reprinted in* 3 I.L.M. 925.

71. Territorial Sea and Fishing Zones Act, R.S.C. 1964, c 22, §§ 3(1), 4(1) (Can.), *reprinted in* 3 I.L.M. 922.

72. Agreement Between Canada and France on Their Mutual Fishing Relations, Can.-U.S., Mar. 27, 1972, *reprinted in* NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA, *supra* note 4, at 570.

73. VCLT, *supra* note 21, art. 59.

74. *See supra* Part II.A.

75. *Cf. Crootof, Killer Robots, supra* note 42, at 1898 (arguing that autonomous weapon systems should be regulated through a framework convention).

widespread ratification, states may engage in “buck passing” and conclude toothless agreements. Thus, “in some ways [the use of protocols] only puts a different name to a familiar problem,” as attempting modification through either treaty supersession or amplifying protocols is effective only to the extent that all states parties to the original treaty ratify the subsequent agreement.⁷⁶

C. *Adaptive Interpretation*

Because they aim to appeal to all states and must accommodate varied interests, multilateral treaties usually employ broad language and set generalized standards rather than specific rules.⁷⁷ As a result, the expansive provisions that typify multilateral treaty agreements are more amenable to imaginative interpretation than those found in relatively concrete bilateral treaties.⁷⁸ Adaptive interpretations—interpretations not immediately suggested by the treaty, but which attempt to reconcile outdated text with actual (or sometimes desired) state action—are doctrinally legitimate to the extent that all states parties explicitly or implicitly accept them, which will usually depend on whether or not the proposed interpretation is in keeping with the multilateral treaty’s object and purpose.⁷⁹ State acceptance may be manifested in a variety of ways: in written instruments; by subsequent state party conduct; or even, in certain circumstances, by silence.

Adaptive interpretation is fundamentally distinct from other forms of consent-based modification in two ways. First, the consent to new adaptive interpretations need not be explicit. In multilateral regimes, consent is often inferred from the actions or even the inaction of states parties. However, this can be problematic, as states’ silence may not signal consent. Second, unlike amendment or supersession, adaptive interpretation does not purport to alter states parties’ legal rights or obligations, but merely to clarify them or fill gaps in the existing law. However, the line between interpretation and modification is a thin one, and one that may shift with the interpreter.

1. *“Living Treaties” and Teleological Interpretation*

There are three primary schools of thought on treaty interpretation: the “textual” or “ordinary meaning of the words” school, the “intentions of the parties” school, and the “teleological” or “aims and objects” school.⁸⁰ Article

76. Blum, *supra* note 5, at 353.

77. *Id.* at 350.

78. See HANS Kelsen, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS*, at xiv-xv (9th prtg. 2000) (“That the law is open to more than one interpretation is certainly detrimental to legal security; but it has the advantage of making the law adaptable to changing circumstances, without the requirement of formal alteration.”). Parties to bilateral agreements may have less need for adaptive interpretation, as two states, as opposed to multiple states, are better able to address likely complications before they arise or amend or supersede the treaty afterwards.

79. See *supra* note 9 (distinguishing adaptive interpretation from evolutive interpretation).

80. See Int’l Law Comm’n, Rep. on the Work of Its Eighteenth Session, U.N. Doc. A/6309/Rev.1, at 218 (1966) [hereinafter ILC Report].

31(1) of the Vienna Convention on the Law of Treaties, which provides the general rules of treaty interpretation, attempts to integrate all three. It provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."⁸¹

The textual approach is not ideal in multilateral regimes, as words never have a truly unambiguous meaning. Claiming they do merely "veil[s] the process whereby a person, a court, or another body reaches a certain conclusion which inclines them to regard a particular meaning as the natural and plain meaning of a given word."⁸² Additionally, as the number of states parties to the treaty regime grows, the likelihood that they agree upon the meanings of controversial words lessens.

Furthermore, while the original intentions of the parties may be highly relevant in the construction of bilateral, contract-like agreements, original intentions are less relevant in interpreting multilateral treaties. Given the sheer number of parties, it is impossible to establish their original intent.⁸³ Furthermore, as states regularly accede to multilateral agreements long after the treaty originally took effect, they "can not be supposed to have accepted interpretations suggested in the preliminary conversations of the original negotiators."⁸⁴

Accordingly, while the "textual" or "original intent" methodologies may be appropriate or even preferable in bilateral treaty construction, the "aims and object" approach is most sensibly applied to the interpretation of constitutive, multilateral treaties.⁸⁵ Such law-making treaties should not be understood as static, dead contracts—rather, they are living texts, so interpreting them adaptively, in light of their objects and purposes, is the best way to maintain their continued relevance.⁸⁶ Recognizing the usefulness of evolutive interpretation, states negotiating a treaty sometimes intend for its provisions to be interpreted dynamically.⁸⁷ The U.N. Charter, for example, was always intended to be a living instrument.⁸⁸

81. VCLT, *supra* note 21, art. 31(1).

82. Pollux, *The Interpretation of the Charter*, 23 BRIT. Y.B. INT'L L. 54, 67 (1946) ("Pollux" is a pseudonym used by Edvard Hambro); see also Kelsen, *supra* note 78, at xiv; Myres S. McDougal & Richard N. Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 YALE L.J. 258, 264 (1951).

83. Pollux, *supra* note 82, at 70; see also McDougal & Gardner, *supra* note 82, at 264-65.

84. Wright, *supra* note 28, at 104. The U.N. Charter, for example, was originally concluded by fifty states, but its members now number nearly two hundred.

85. See, e.g., McDougal & Gardner, *supra* note 82, at 266-69 (citing sources); Sloan, *supra* note 33, at 105-06, 111.

86. The European Court of Human Rights has adopted perhaps the broadest understanding of this approach in its interpretation of the European Convention on Human Rights. It considers the Convention "a living instrument which . . . must be interpreted in light of present-day conditions." *Tyler v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) ¶ 31 (1978).

87. See, e.g., Arato, *supra* note 9 (discussing approaches to treaty interpretation based on the original and subsequent intent of states parties).

88. See, e.g., Pollux, *supra* note 82, at 54 ("The Charter, like every written Constitution, will be a living instrument."); Sloan, *supra* note 33, at 118 (quoting John Foster Dulles as stating, "What is needed is a principle that is sufficiently basic to guide the organization through the many years to come,

The usefulness of teleological interpretation of constitutive treaties is evidenced by Article 51 of the U.N. Charter, which protects a state's "inherent right of individual or collective self-defence if an armed attack occurs," at least "until the Security Council has taken measures necessary to maintain international peace and security."⁸⁹ Under the textual approach, a state could act in lawful self-defense under the Charter only after an armed attack occurred—to read the provision otherwise would be to read "if an armed attack occurs" as superfluous. Under the intent of the parties school, the Charter apparently codified a right which was governed in 1945 by the *Caroline* standard: A state might act in anticipatory self-defense—which is to say, before an armed attack occurred—but only if an attack was imminently threatened and was "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."⁹⁰ Instead, Article 51 has been interpreted to exist alongside a customary—and thus changing—right to self-defense.⁹¹ As a result, the definition of an imminent attack justifying the anticipatory responsive use of force has been able to evolve in tandem with new developments in warfare and weaponry.

The problem with teleological interpretations is, of course, that one interpreter's understanding of a treaty's goals may differ starkly from another's—as evidenced by the ongoing debate over what level of imminence is required for lawful, anticipatory defensive uses of force.⁹² This is further complicated by the fact that any given treaty will have multiple goals. The U.N. Charter, for example, lists four express purposes for the United Nations: "[t]o maintain international peace and security" through a variety of measures, including settling disputes between states "in conformity with the principles of justice and international law"; "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"; "[t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"; and "[t]o be a centre for harmonizing the actions of nations in the attainment of these common ends."⁹³ While common themes underlie these purposes, they will sometimes come into conflict. Is maintaining regional peace more

and to permit of evolution according to what may, during those years, be the developing ideas and changing conditions of the world community"); Oscar Schachter, Book Review, 60 YALE L.J. 189, 193 (1951) ("The Charter . . . is a constitutional instrument whose broad phrases were designed to meet changing circumstances for an undefined future.").

89. U.N. Charter, *supra* note 3, art. 51.

90. Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, British Foreign Secretary (Aug. 6, 1842), reprinted in 2 MOORE DIGEST 412 (1906).

91. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 174-80 (June 27).

92. See, e.g., Howard A. Wachtel, Note, *Targeting Osama Bin Laden: Examining the Legality of Assassination as a Tool of U.S. Force*, 55 DUKE L.J. 677, 690 (2005) (describing three U.S. interpretations of "self-defense" under Article 51).

93. U.N. Charter art. 1. Nor are these all of the goals—the preamble lists many more, and various articles clarify how these goals may and may not be attained.

important than promoting certain human rights? What about when the “principles of justice” and “international law” are at odds? Accordingly, while an interpreter should approach the construction of multilateral treaties from a teleological stance, any given interpretation will be legitimate and successful only to the extent it reflects the agreement of the states parties—the subject of the next subsection.

2. *The Importance of the Audience*

While the success of any new interpretation of a text depends on how well or badly it is received,⁹⁴ this is all the more true in the international sphere. In domestic law, sometimes-improbable interpretations of a text might nonetheless enjoy the seal of an authoritative interpreter, and therefore be accepted as legitimate (if poorly reasoned). As there will often be no designated treaty interpreter,⁹⁵ however, the legitimacy of a new interpretation depends on whether the audience—the other treaty partners, which in multilateral conventions can include the entire international community—accepts it. As a result, it is more difficult for expansive or controversial interpretations to be accepted in the international legal order.

In determining whether a given construction is legitimate, interpreters are to consider “[t]he context” of the treaty, which includes the treaty’s text and agreements or instruments relating to the treaty made or accepted by all states parties;⁹⁶ “[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions”;⁹⁷ “[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”;⁹⁸ and “[a]ny relevant rules of international law applicable in the relations between the parties.”⁹⁹ There is no hierarchy among these interpretative tools: “All the various elements, as they were present in any given case, [should] be thrown into the crucible, and their interaction [should] give the legally relevant

94. Cf. J.M. Balkin & Sanford Levinson, *Interpreting Law and Music: Performance Notes on “The Banjo Serenader” and “The Lying Crowd of Jews,”* 20 CARDOZO L. REV. 1513, 1519-20 (1999) (discussing the role of the audience in determining whether an interpretation of a text is “authentic or faithful”).

95. See Pollux, *supra* note 82 (discussing which entity has the authority to interpret the U.N. Charter). In certain cases, a treaty will designate an authoritative interpreter. For example, the World Trade Organization Agreement provides that the Ministerial Conference and the General Council “have the exclusive authority to adopt interpretations” of the Agreement for all states parties. Marrakesh Agreement Establishing the World Trade Organization art. IX(2), Apr. 15, 1994, 1867 U.N.T.S. 154, 159. Attempting to distinguish between interpretation and modification, the article continues: “The decision to adopt an interpretation . . . shall not be used in a manner that would undermine the amendment provisions . . .” *Id.* When an authoritative interpreter advances an adaptive interpretation of a treaty, there is less need for states to then consent to it: by designating an interpreter, states parties essentially give *ex ante* consent to be bound by that interpreter’s readings.

96. VCLT, *supra* note 21, art. 31(2).

97. *Id.* art. 31(3)(a).

98. *Id.* art. 31(3)(b).

99. *Id.* art. 31(3)(c).

interpretation.”¹⁰⁰ While some tribunals have implied that treaty text is superior to subsequent practice or other relevant rules of international law,¹⁰¹ the only hierarchy is between the aforementioned primary ones and “the preparatory work of the treaty and the circumstances of its conclusion,” which are “supplementary means of interpretation.”¹⁰²

In keeping with treaty law’s grounding in state consent, a crucial element for all but the last of the primary considerations is the states parties’ agreement. Instruments must be accepted by all parties as related to the treaty, subsequent agreements relating to the interpretation or application of the treaties must be made between the parties, and subsequent practice is relevant only insofar as it “establishes the agreement of the parties regarding [the treaty’s] interpretation.”¹⁰³ The importance of general acceptance of new interpretations by all states parties was reiterated at the 1945 U.N. Conference on International Organization in a statement regarding the construction of the Charter. While noting that each Charter organ (the General Assembly, the Security Council, the ICJ, etc.) had the authority to interpret different Charter provisions as “applicable to its particular functions,” the statement clarified “that if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force.”¹⁰⁴

Ex ante or *ex post* state party consent is necessary to establish the legitimacy, and thus success, of a new interpretation.¹⁰⁵ Such consent will be easy enough to establish when states have designated an authoritative interpreter, have made or accepted instruments relevant to the interpretation of the treaty, or have concluded agreements regarding the treaty’s meaning or application. But, especially in multilateral regimes without designated interpreters, states parties will rarely explicitly affirm a new construction of a text—instead, they may do nothing at all. When does state silence actually signal tacit consent?

3. *When State Party Conduct Becomes Subsequent Practice*

Article 27(3) of the U.N. Charter provides that Security Council decisions on nonprocedural matters “shall be made by an affirmative vote of seven members *including the concurring votes of the permanent members*.”¹⁰⁶ Scholars were quick to debate the meaning of this provision. Some concluded that it was “unambiguous” and clearly required the presence and concurring vote of all five permanent members for the Security Council to pass a valid

100. ILC Report, *supra* note 80, at 219-20.

101. See Moloo, *supra* note 7, at 43 (providing examples).

102. VCLT, *supra* note 21, art. 32.

103. *Id.* art. 31(2)-(3).

104. Rep. of the Rapporteur of Comm. IV/2 to Comm’n IV, Doc. 933 IV/2/42, 13 U.N.C.I.O. Doc. 703, 710 (1945).

105. The only exception is for interpretations grounded in other relevant rules of international law, including customary international law. VCLT, *supra* note 21, art. 31(3)(c).

106. U.N. Charter, *supra* note 3, art. 27, para. 3 (emphasis added).

resolution.¹⁰⁷ Others read two possible interpretations into the language: one requiring the presence and concurring vote of all five permanent members, and one requiring the concurring vote of all participating permanent members.¹⁰⁸ Myres McDougal and Richard Gardner argued powerfully that the “literal” reading of the text would gravely contradict the Security Council’s purpose of addressing issues related to collective security, as it

would permit a single permanent member . . . by its wilful refusal to participate in the deliberations of the Council, not simply to protect its own interests in inaction, but rather to impose upon the other members its views as to how they should or should not use their collective strength and thus, perhaps, to dictate to the whole organization a policy of futility and destruction.¹⁰⁹

In keeping with McDougal and Gardner’s effectiveness analysis, the Security Council’s actions seem to favor the less literal reading. Between January 1946 and December 1949, the Security Council passed roughly forty nonprocedural decisions with the abstention of one or more permanent members.¹¹⁰ When the Soviet Union withdrew during discussion of the Iranian case in March 1946, the Security Council continued to sit and pass resolutions, (although whether these resolutions were substantive or procedural is debatable).¹¹¹ Additionally, when a nonpermanent member was absent during a substantive vote, the President stated that the member would be counted as having abstained.¹¹² And, after the Soviet Union again withdrew in 1950 in protest of the Council’s refusal to seat Nationalist China, the Security Council nonetheless passed substantive resolutions condemning North Korean aggression.¹¹³

In 1970, the South African government challenged the validity of a resolution from which two permanent members abstained, arguing that it did not satisfy Article 27’s requirement.¹¹⁴ The ICJ disagreed:

[T]he proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. . . . This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United

107. See Leo Gross, *Voting in the Security Council: Abstention from Voting and Absence from Meetings*, 60 YALE L.J. 209, 249, 256 (1951) (including abstentions as concurring votes on the grounds that they manifest “tacit consent”); Yuen-Li Liang, *Abstention and Absence of a Permanent Member in Relation to the Voting Procedure in the Security Council*, 44 AM. J. INT’L L. 694, 695-96, 695 n.6 (1950) (citing sources).

108. See KELSEN, *supra* note 78, at 240-41; McDougal & Gardner, *supra* note 82, at 260, 280.

109. McDougal & Gardner, *supra* note 82, at 285.

110. Liang, *supra* note 107, at 696; McDougal & Gardner, *supra* note 82, at 278.

111. McDougal & Gardner, *supra* note 82, at 279.

112. *Id.* at 279-80.

113. *Id.* at 259.

114. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 21 (June 21).

Nations and evidences a general practice of that Organization.¹¹⁵

In short, the ICJ found that the Security Council's actions over many years in conjunction with the lack of protest by member states constituted subsequent practice evidencing state party agreement as to the proper interpretation of Article 27.

"Subsequent practice" is a term of art in international law. When interpreting a treaty, "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" must be taken into account.¹¹⁶ "Subsequent practice" is thus to be distinguished from mere "state party conduct"—the former establishes an informal agreement between states parties regarding the proper interpretation of a treaty;¹¹⁷ the latter is merely how one or more parties implement the treaty or conduct themselves after concluding the treaty. Subsequent practice is that subset of state party conduct that all parties agree is relevant to the interpretation of the treaty.

When state party conduct becomes subsequent practice—when state action can be deemed to manifest an informal agreement regarding the interpretation of the treaty—is far from obvious. Rather, there will be a spectrum, ranging from a written interpretation reflecting the agreement of all states parties and clearly relevant to interpretation under Article 31(3)(a); to an unwritten understanding between the states parties manifested by their conduct and therefore relevant as subsequent practice under Article 31(3)(b); to a state party's conduct, which might be based on a unilateral and thus illegitimate interpretation under Article 31(3). Different tribunals have adopted widely divergent criteria—which is to say, they have drawn different lines in the sand—distinguishing between these categories.¹¹⁸

One important consideration when evaluating whether state party conduct constitutes subsequent practice is when a party's inaction or silence can be legitimately understood as signaling agreement or acquiescence. A complete analysis of when state silence signals agreement is beyond the scope of this Article, but at a minimum the state in question must have known about the action, had a sufficient period of time to express its dissent, and intentionally remained silent.¹¹⁹ For example, in interpreting a treaty between Nicaragua and Costa Rica regarding the use of the San Juan river, Judge Skotnikov held that Nicaragua's silence with regard to Costa Rica's use of the river for tourism

115. *Id.* ¶ 22.

116. VCLT, *supra* note 21, art. 31(3)(b).

117. "Subsequent practice" should also be distinguished from "state practice," one of two elements required for a norm to be recognized as binding customary international law. *See infra* Part III.A.5 (discussing import of this distinction).

118. *Cf. Arato, supra* note 7, at 294-95, 351-52.

119. *See Moloo, supra* note 7, at 65-68 (concluding that "in order for silence to be considered relevant for the purposes of Article 31(3)(b), it must be: in response to the consistent conduct of the other party or parties reaffirming a particular interpretation; and conduct that the silent party ought reasonably to be aware of and object to in light of the extent of the party conduct"); *cf. A. JOHN SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 80-81 (1979) (discussing the necessary conditions for silence to be considered "significant" and thus legitimate tacit consent).

established that Costa Rica enjoyed a right to use the river for tourism.¹²⁰ In reaching this conclusion, Judge Skotnikov relied on the fact that Nicaragua knew of and never protested Costa Rica's use of the river for tourism (in contrast to its treatment of Costa Rican police vessels, which Nicaragua regularly asserted had no right to use the river).¹²¹

Determining when state party silence or inaction is intended to signal agreement with a proposed interpretation of treaty text is difficult and of questionable legitimacy in multilateral treaty regimes. Determining when state party conduct is also subsequent practice signaling agreement to an interpretation is dubious enough, but it is even more problematic when treaty interpretation starts to bleed into treaty modification.

4. *When Interpretation Becomes Modification*

What obligations does a state assume after it forcibly overthrows another state's government?¹²² The Hague Regulations and the Geneva Conventions, which apply during periods of occupation by foreign military forces, "expressly forbid[]" anything other than minimal interference with the governing structure of the occupied territory.¹²³ However, "[i]n recent years, states have consistently moved beyond the express terms of the Hague and Geneva regime to introduce sweeping reforms in the aftermath of military intervention."¹²⁴ In other words, actual state party conduct has diverged starkly from the treaty's language.

Jay Butler characterizes this contradictory state action as subsequent practice interpreting the treaty.¹²⁵ Alternatively, state party conduct might be described either as subsequent practice evidencing state party agreement to modify the treaty or as subsequently developed customary international law modifying the treaty. Which of these characterizations is correct depends in large part on the sometimes-fine, sometimes-debatable line between state practice interpreting and state practice modifying a treaty.

Treaty interpretation must be distinguished from treaty modification. At least in principle, "interpretation" illuminates a treaty's terms or applicability. Interpretation may be in line with the existing law (amendment *secundum* or *intra legem*) or serve a gap-filling function (amendment *praeter legem*).¹²⁶ In

120. Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 I.C.J. 213, 285 (July 13) (separate opinion by Judge Skotnikov).

121. *Id.*

122. See Jay Butler, *Responsibility for Regime Change*, 114 COLUM. L. REV. 503 (2014).

123. *Id.* at 511. Butler specifically cites to the Hague Convention Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 43, Oct. 18, 1907, 36 Stat. 2277. He also cites the Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 64, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

124. Butler, *supra* note 122, at 513-14.

125. *Id.* at 506-07 (describing state conduct as "subsequent practice establishing the agreement of the parties").

126. GODEFRIDUS J. H. HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 276-79 (1983).

contrast, “modification” substantially alters the treaty obligations (amendment *contra legem*).¹²⁷

That being said, “[i]t is inevitably difficult, if not impossible, to fix the dividing line between interpretation properly so called and modification effected under the pretext of interpretation.”¹²⁸ In an attempt to do so, and in keeping with the teleological approach to treaty interpretation, the ICJ has attempted to demarcate the outer zone of permissible treaty interpretation:

The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which . . . would be contrary to their letter and spirit.¹²⁹

State party conduct contrary to the letter and spirit of a treaty effects a modification, not an interpretation—and, at least according to this ICJ opinion, cannot be a justifiable reading of the treaty. Of course, whether a certain interpretation revises or modifies a treaty depends to a large degree on what the interpreter believes to be the object and purpose of the treaty.¹³⁰

Similarly, subsequent practice evidencing agreement regarding a permissible interpretation of the treaty’s text must be distinguished from subsequent practice that instead evidences agreement to modify the treaty. The legality of the former was clarified in the Vienna Convention and has a reputable history;¹³¹ the legality of the latter is subject to some doubt. The International Law Commission, while drafting articles for the Vienna Convention, elected to remove a provision providing for treaty modification based in agreement manifested through the subsequent practice of the states parties, leaving open the question of the legitimacy of such modification.¹³²

Because the legitimacy of treaty modification by subsequent practice is less well-established, those favoring an alteration tend to characterize such modifications as mere interpretations. This is easy to do where the treaty has multiple reasonable goals and purposes. For example, in arguing that states are

127. *Id.*

128. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 138 (2d ed. 1984); see also RICHARD GARDINER, *TREATY INTERPRETATION* 275 (2d ed. 2015) (comparing the search for the distinction between interpretation and modification to *Waiting for Godot*, given that (1) the practical result of the two processes is the same and (2) all state action based on a treaty text is necessarily interpretative).

129. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion, 1950 I.C.J. 221, 229 (July 18) (emphasis added); see also ILC Report, *supra* note 80, at 219 (“[I]n the *Peace Treaties* cases, the ICJ emphasized that to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty.”).

130. See, e.g., *Peace Treaties*, 1950 I.C.J. at 237 (dissenting opinion by Judge Read) (stating, with regard to the majority’s opinion, “[i]n the entire history of the Permanent Court, there is no instance in which an argument was advanced that went so far in depriving a treaty of a great part of its value, or in frustrating its general purposes and objects”).

131. VCLT, *supra* note 21, art. 31(3)(b).

132. See *THE VIENNA CONVENTION ON THE LAW OF TREATIES: TRAVAUX PRÉPARATOIRES* 309 (Dietrich Rauschning ed., 1978); Akehurst, *supra* note 14, at 277; Sean D. Murphy, *The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties*, in *TREATIES AND SUBSEQUENT PRACTICE* 82, 89 (Georg Nolte ed., 2013); see also *infra* text accompanying notes 246, 251-253.

merely interpreting the Hague Regulations and Geneva Convention, Butler presumably reasons that the state party conduct is in line with the treaties' objects and purposes—perhaps because one of their ultimate goals is the swift reestablishment of a stable political regime in the occupied state, making any interpretation that promotes such stability a fair reading. Alternatively, if the relevant treaty provisions are understood as intended to prioritize respect for a state's sovereign right to govern itself, the same state party conduct appears to effect a modification.

While it may be impossible to pinpoint the exact dividing line between subsequent practice signaling agreement regarding an interpretation or effecting a modification, there will also be identifiable situations at the far ends of the spectrum. As discussed above, the Security Council's practices relevant to the interpretation of Article 27(3), which were consistent and generally went uncontested, evidenced agreement regarding the provision's interpretation.¹³³

On the other end of the interpretation/modification continuum, in a controversial 1964 decision, the ICJ classified certain state action as treaty interpretation despite the fact that it directly contradicted and thereby apparently modified the treaty. In 1904, a treaty between Cambodia and Thailand created a joint commission to demarcate their border according to a watershed, which placed the ancient Hindu temple of Preah Vihear in Thai territory. However, a 1907 map drawn by French authorities relocated the boundary without explanation, placing the temple squarely in Cambodian territory. The ICJ determined that both parties accepted the French map in 1908 as an "interpretation" of the treaty text: "the Parties at that time adopted an interpretation of the treaty settlement which caused the map line, in so far as it may have departed from the line of the watershed, to prevail over the relevant clause of the treaty."¹³⁴ Despite terming this an "interpretation," the ICJ seems instead to have endorsed modification by subsequent state party conduct. The original treaty intended to set the boundary in one spot; the 1907 map moved it elsewhere. Unsurprisingly, this opinion has been critiqued for "blur[ring] the line between interpretation and amendment."¹³⁵ Is such modification legitimate?

A fair argument can be made that, since treaties may always be modified by state party consent and since state party conduct may demonstrate a collective intention to modify a treaty, subsequent practice may be viewed as evidence of the agreement of the parties to modify a treaty. If legitimate, this would be an appealing solution to one of the driving concerns of this Article—

133. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 22 (June 21).

134. Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6, 34 (June 15).

135. Moloo, *supra* note 7, at 79; see also Temple of Preah Vihear, 1962 I.C.J. at 134 (dissenting opinion by Judge Spender) ("This, in my view, is not treaty interpretation. It amounts, in my opinion, to redrafting the Treaty of 1904 in accordance with a presumed intention of the two States, an intention indeed which is not to be found within the terms of the Treaty itself nor, in my view, elsewhere in the evidence; a presumed intention which is moreover quite inconsistent with the plain terms . . . of the Treaty . . .").

determining how outdated treaty texts are to be reconciled with contradictory subsequent state practice.

In particular, recognizing and legitimating modification through subsequent practice lends clarity to the theory of desuetude, a form of treaty termination. It is generally assumed that states may allow a treaty, as a whole or portions thereof, to fall into desuetude by electing not to enforce their rights—by tacitly consenting to a whole or partial termination. For example, France and Great Britain signed a convention in 1815 requiring the extradition of any person seeking refuge from one state's prosecution for crimes committed or civil debts in the East Indies.¹³⁶ Between 1815 and 1876, the customary international law regarding extradition evolved: "States began to view extradition as a general duty to one another involving principally common criminals," and "according to the practice of the majority of the States, . . . a State was not obliged to extradite its own nationals."¹³⁷ Although France and Great Britain signed other agreements modifying the 1815 Convention to comply with these changes in customary international law regarding extradition with respect to their European territory, the 1815 Convention remained in force in the East Indies.¹³⁸ However, despite the fact that the 1815 Convention appeared to require the extradition of all individuals for all offenses, in practice the states restricted its application to nonnational criminal offenses.¹³⁹ Based on the inaction of the states parties, by the early twentieth century the 1815 Convention was considered abandoned in its entirety.¹⁴⁰

Desuetude is a particularly legitimate example of intentional treaty modification through subsequent practice signaling the agreement of the states parties, in part because the bar for establishing the tacit consent of states parties is so high.¹⁴¹ First, the state must fail to exercise its rights for an extended period of time.¹⁴² Second, the passage of time alone is not sufficient¹⁴³: "States party to the treaty must have failed to invoke it in situations where they would have been expected to do so, or they must have acquiesced in conduct constituting *prima facie* a treaty violation."¹⁴⁴ State silence must be "significant" in order to constitute tacit consent to the treaty's complete or

136. Convention Between Great Britain and France Relative to the Trade in Salt, Opium, and Saltpetre, in India, Fr.-Gr. Brit., art. 9, Mar. 7, 1815, *reprinted in* 2 BRITISH AND FOREIGN STATE PAPERS 219, 225 (1839); *see also* KONTOU, *supra* note 14, at 72.

137. KONTOU, *supra* note 14, at 73.

138. *Id.* at 72-73.

139. *Id.* at 73.

140. *Id.* at 73-74.

141. Both the ICJ and the International Law Commission understand desuetude to be grounded in the tacit consent of states parties and therefore covered by Article 54 of the Vienna Convention. *See id.* at 25-26 (providing examples).

142. *Id.* at 25.

143. Cf. Yoram Dinstein, *The Interaction Between Customary International Law and Treaties*, 322 RECUEIL DES COURS 243, 414 (2006) ("[D]esuetude of a treaty does not result simply from 'the fact that no practical use of the treaty provisions has been made over an extended period of time.'" (quoting ATHANASSIOS VAMVOUKOS, *TERMINATION OF TREATIES IN INTERNATIONAL LAW: THE DOCTRINES OF REBUS SIC STANTIBUS AND DESUETUDE* 276 (1985))).

144. KONTOU, *supra* note 14, at 25.

partial termination—a state must remain silent despite knowing there was a reason to exercise a right and having a period of reasonable duration in which it could do so.¹⁴⁵ Finally, “[i]t goes without saying that a tacit consent to the termination of a treaty must be evinced by all the Contracting Parties and not only by some of them.”¹⁴⁶ The legitimacy of desuetude is also grounded in the fact that it involves a state deciding not to enforce its own treaty rights—which differs fundamentally from a state arguing for a treaty modification that lessens its own obligations or limits another state’s rights.

While subsequent practice may evidence state party agreement to allowing all or part of a treaty to fall into desuetude, there are two main problems with legitimizing other types of treaty modification by subsequent state practice. First, whose practice constitutes state action? Recall that the state is not a unitary entity. In the 1963 case *United States v. France Air Transport Services Agreement Arbitration*, for example, the conduct of the lower level administrative officials—who clearly had no authority to conclude treaties on behalf of their respective states—was controversially considered relevant state party conduct and “a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the Parties and on the rights that each of them could properly claim.”¹⁴⁷ It seems odd that state officials who could not create international obligations through treaty law nonetheless had the power to modify those obligations. And it is even more inappropriate to presume the tacit consent of state officials with such authority, given that they were unlikely to know of the actions of lower-level administrators. However, this concern could be addressed, perhaps by setting limits on which state officials’ actions constitute “state party conduct” for the purpose of assessing whether there is subsequent practice evidencing agreement to modify a treaty.

Second, states will likely often argue that the silence of their treaty partners in the face of controversial conduct constitutes subsequent practice evidencing agreement to a modification. Again, however, it may be difficult to determine when silence legitimately signals tacit consent. In the *Preah Vihear* case there were strong arguments for why, although Thailand never contested the French map’s placement of the temple, it was inappropriate to describe its silence as acceptance.¹⁴⁸ While this issue might be addressed in the bilateral context by requiring a high threshold showing that a state’s silence was knowing and intentional over an extended period of time, as is required for desuetude, it will be nearly impossible to demonstrate in a multilateral treaty regime. Given the greater number of states parties, state party conduct will

145. See *supra* text accompanying note 119.

146. Dinstein, *supra* note 143, at 412.

147. Interpretation of the Air Transport Servs. Agreement Between the United States of America and France, 16 R.I.A.A. 5, 63 (Arb. Trib. 1963).

148. See *Temple of Preah Vihear (Cambodia v. Thai.)*, Judgment, 1962 I.C.J. 6, 135-39 (June 15) (dissenting opinion by Judge Spender) (noting that the location of the temple was not of great interest to the parties in 1908-1909 and that France presented the contested map as depicting the true line of the watershed).

rarely mature into subsequent practice evidencing agreement regarding a modification without presuming tacit consent. And demonstrating that all other treaty parties' silence was knowing, intentional, and persisted for a reasonable period of time—as is necessary for silence to be sufficiently significant to be considered consent—will not be possible.

* * * * *

The most obvious options for reconciling treaty text and contradictory state action are the traditional, formal methods: amendment, supersession, and the use of additional protocols. Unfortunately, in the case of the U.N. Charter, the Geneva Conventions, or other such constitutive multilateral treaties, these formal approaches will often be politically or practically infeasible.

When formal amendment is not a viable option, states may turn to adaptive interpretation to reconcile their treaty obligations and their actual practice. By clarifying vague language and filling textual gaps, adaptive interpretation can rescue many treaty provisions from obsolescence. But words are not infinitely elastic. As treaties age, state party conduct may increasingly diverge from the treaty's apparent textual meaning, the intentions of its drafters, and its object and purpose. Regardless to which school of treaty interpretation one subscribes, situations will arise where state party conduct is at odds with any plausible reading of the treaty.

One solution is to claim that the states parties have demonstrated their agreement to modify the treaty text by their conduct, but given the difficulty of demonstrating genuine tacit consent, this will often be of questionable legitimacy in the multilateral context. Alternatively, and with greater legitimacy, one might characterize many of these situations as instances where new customary international law has modified the conflicting treaty provisions.

III. MODIFICATION BY SUBSEQUENTLY DEVELOPED CUSTOMARY INTERNATIONAL LAW

In certain situations, none of the traditional methods of modifying a treaty by mutual consent will be compatible with subsequent state conduct. States nonetheless engage in such conduct—and both the state and other members of the international community act as though it is lawful. When this occurs, the most accurate characterization of the situation is that subsequently developed customary international law has modified the treaty. Not only may this sometimes be the most legitimate route by which outdated treaty law is updated, it is increasingly likely to occur in today's world of constitutive treaties and swiftly developing customary international law.

A. When Customary International Law Alters Treaty Obligations

Given that tacit state "consent" to new customary international law is inferior to a state's explicit consent to treaty obligations, the possibility that a treaty might be modified by subsequent customary international law without the consent of states parties is anathema to many international law scholars and practitioners. The purpose of this section is thus primarily descriptive: it

highlights circumstances where the existence of currently accepted international law cannot be explained solely in terms of traditional methods of treaty modification. By providing concrete, historic examples of situations where subsequently developed customary international law has altered treaty obligations—sometimes without the consent of states parties—this section supports those few scholars who have claimed that customary international law should be able to modify treaty law.¹⁴⁹

1. *The Possibility of Automatic Treaty Termination*

Beginning in 1535, the capitulatory regime—a series of agreements between the Ottoman Empire and European powers—granted the Capitulatory Powers certain jurisdictional rights in Turkey: (1) Capitulatory Powers' nationals were subject only to their own national laws, applied by their own consuls; (2) where Turkish courts retained jurisdiction, the Capitulatory Powers could intervene in the proceedings; and (3) Capitulatory Powers' nationals were exempted from most Turkish taxes.¹⁵⁰ As customary international law evolved, however, "[c]onsular jurisdiction came to be regarded as incompatible with sovereignty."¹⁵¹ Accordingly, in 1914, Turkey announced its intention to unilaterally abrogate the Capitulatory treaties on the basis that they were "obsolete"¹⁵² and "in complete opposition to the juridical rules of the century and to the principle of national sovereignty."¹⁵³ Although some Capitulatory Powers protested Turkey's unilateral action, at the 1922 Lausanne Conference they acknowledged that the Capitulations were in direct conflict with subsequently developed customary sovereign rights¹⁵⁴ and concluded a peace

149. See, e.g., CASSESE, *supra* note 14, at 154; KONTOU, *supra* note 14, at 20; VILLIGER, *supra* note 14, at 58-59; Akehurst, *supra* note 14, at 275; Bos, *supra* note 14, at 337.

150. KONTOU, *supra* note 14, at 78; see also S. DOC. NO. 67-34, at 94-96 (1921) (providing an English translation of the Capitulatory treaty between the Ottoman Empire and France concluded in February 1535).

151. KONTOU, *supra* note 14, at 79.

152. Letter from Said Halim, Minister for Foreign Affairs, to Henry Morgenthau, U.S. Ambassador to the Ottoman Empire (Dec. 5, 1914), reprinted in U.S. DEP'T. OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES WITH THE ADDRESS OF THE PRESIDENT TO CONGRESS DECEMBER 7, 1915, at 1302, 1302 (1924).

153. Letter from Said Halim, Minister for Foreign Affairs, to Henry Morgenthau, U.S. Ambassador to the Ottoman Empire (Sept. 9, 1914), reprinted in U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES WITH THE ADDRESS OF THE PRESIDENT TO CONGRESS DECEMBER 8, 1914, at 1092, 1092 (1922); see also KONTOU, *supra* note 14, at 79-80 (describing Turkey's objections to the treaties).

154. Marquis Garroni, the Italian ambassador to the Ottoman Empire, stated, "It must . . . be recognised that according to present-day ideas of law the capitulatory régime is regarded as liable to diminish the sovereign powers of an independent State; and it is intellible that Turkey should demand the abolition of this régime, which has had its day." LAUSANNE CONFERENCE ON NEAR EASTERN AFFAIRS 1922-1923: RECORDS OF PROCEEDINGS AND DRAFT TERMS OF PEACE 467 (1923). Conference notes say that Camille Barrère, the French ambassador to Italy, expressed the view that the "task of the conference was to devise a system more suited to modern requirements in place of the capitulatory system, which was in consonance with archaic ideas," *id.* at 468, and that the "French delegation had agreed to renounce the Capitulations because they considered that some features of that régime were out of date, and that others—especially those respecting financial matters—were in part unjust," *id.* at 492. Sir Horace Rombold, the British High Commissioner, insisted that the "Allied delegations . . . were not only willing but anxious to devise a substitute compatible with Turkey's sovereign rights." *Id.* at 485.

treaty providing for “the complete abolition of the Capitulations in Turkey in every respect.”¹⁵⁵

The same capitulatory regime that granted Capitulatory Powers nationals rights in Turkey also applied in Egypt.¹⁵⁶ Egypt similarly protested the continuance of capitulatory privileges, and in 1937 it invited the Capitulatory Powers to a conference with the intention of abolishing the regime entirely. It argued that the regime was “contrary to the principles of modern law” because it “constitut[ed] an obvious infringement of the sovereignty of the state.”¹⁵⁷ Great Britain—one of the Capitulatory Powers—supported Egypt’s position and implied that if the other Powers obstructed Egypt’s efforts, Egypt could make a legal case for its unilateral right to abolish the Capitulations.¹⁵⁸ The United States agreed, and supported the termination of the Capitulations to avoid the thorny question of whether Egypt’s proposed unilateral termination would be justified.¹⁵⁹ Ultimately, the Conference participants agreed to complete abolition of the Egyptian Capitulations.¹⁶⁰

According to conference notes, Maurice Bompard, the former French ambassador to the Ottoman Empire who took over the French delegation when Barrère left Lausanne, MARIAN KENT, *MOGULS AND MANDARINS: OIL, IMPERIALISM AND THE MIDDLE EAST IN BRITISH FOREIGN POLICY, 1900-1940*, at 113 (2011), acknowledged that the “capitulatory régime was doubtless defective, and in many respects out of date. Its revision and even its abolition were necessary,” LAUSANNE CONFERENCE ON NEAR EASTERN AFFAIRS 1922-1923, *supra*, at 499. The preamble to the Draft Convention Respecting the Régime Applicable to Foreigners in Turkey stated that the parties were “desirous of settling, in accordance with modern international law, the régime applicable to foreigners in Turkey under conditions consistent both with the sovereignty of Turkey and with the legitimate protection of their rights.” *Id.* at 790.

155. Treaty of Lausanne art. 28, July 24, 1923, 28 U.N.T.S. 11.

156. See *Règlement d'Organisation Judiciaire pour les Procès Mixtes en Égypte*, reprinted in 66 BRITISH AND FOREIGN STATE PAPERS 593 (1874-1875); JASPER YEATES BRINTON, *THE MIXED COURTS OF EGYPT* (1930); see also KONTOUT, *supra* note 14, at 82-85 (recounting history of the Capitulatory treaties with Egypt).

157. Telegram from Bert Fish, U.S. Ambassador to Egypt, to Cordell Hull, U.S. Sec’y of State (Jan. 17, 1937) (containing English translation of a message from Egyptian Minister of Foreign Affairs), reprinted in 2 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS: THE BRITISH COMMONWEALTH, EUROPE, NEAR EAST AND AFRICA 615, 615-16 (1937).

158. *Aide-Mémoire* from the British Embassy to the U.S. Dep’t of State (Feb. 23, 1937) (noting that “His Majesty’s Government have promised to support the Egyptian Government in persuading the capitulatory Powers to agree to the abolition of the capitulations in Egypt” and that “His Majesty’s Government . . . feel it their duty to intimate confidentially and without delay to the United States Government that it is by no means clear that the Egyptian Government could not make a good legal case for a right to abolish the capitulations unilaterally”), reprinted in 2 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS: THE BRITISH COMMONWEALTH, EUROPE, NEAR EAST AND AFRICA 622, 622-23 (1937).

159. Letter from Cordell Hull, U.S. Sec’y of State, to President Franklin Delano Roosevelt (Mar. 19, 1937) (“The Department is of the opinion that every reasonable effort should be made to cooperate with the Egyptian Government and the other capitulatory powers for the realization of the Egyptian Government’s desire to be freed from the burden of the capitulatory régime, since such cooperation would be thoroughly in accord with our good neighbor policy. For that reason and in order to avoid the raising of any question as to the legal right of the Egyptian Government unilaterally to terminate the capitulatory régime,—a right which the Egyptian Government appears to have reserved by the terms of the Anglo-Egyptian Treaty of August 26, 1936,—it is respectfully recommended that I be authorized to instruct the American Delegation to the Conference . . . to give to the Egyptian Delegation assurances in the sense of the views expressed herein.”), reprinted in 2 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS: THE BRITISH COMMONWEALTH, EUROPE, NEAR EAST AND AFRICA 628, 631-32 (1937).

160. Convention Regarding the Abolition of the Capitulations in Egypt, May 8, 1937, reprinted in *ACTES DE LA CONFÉRENCE DES CAPITULATIONS: MONTREUX, 12 AVRIL-8 MAI 1937*, at 259 (1937);

When signed in 1903, the Hay-Bunau-Varilla Treaty granted the United States "in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection" of the Panama Canal.¹⁶¹ It also granted the United States "all the rights, power and authority . . . which the United States would possess and exercise as if it were the sovereign . . . to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority."¹⁶² Although the treaty was revised in 1936¹⁶³ and 1955¹⁶⁴ by mutual consent of the parties, Panama remained dissatisfied with its terms. Perhaps because it was unable to back up a unilateral denunciation of the treaty by force, in 1962 it argued before the United Nations that the treaty did "not conform to the principles, precepts and rules of law, justice and international morality which are universally accepted today."¹⁶⁵ In 1973, Panama again claimed that the Treaty was incompatible with

the principles of international law concerning friendly relations and co-operation among states, and particularly those pertaining to respect for the territorial integrity and political independence of States, nonintervention, equality of rights and self-determination of peoples, the sovereign equality of States, the elimination of all forms of foreign domination, the right of peoples and nations to permanent sovereignty over their natural resources, and international co-operation in the economic and social development of all nations.¹⁶⁶

In other words, Panama maintained that the Treaty had been rendered obsolete by new customary international law.¹⁶⁷ Many countries agreed that the Treaty was not in keeping with the post-World War II international order,¹⁶⁸

see also KONTOUT, *supra* note 14, at 84 (describing the Montreux Conference).

161. Hay-Bunau-Varilla Treaty, *supra* note 1, art. II.

162. *Id.* art. III.

163. General Treaty of Friendship and Co-Operation, U.S.-Pan., Mar. 2, 1936, 53 Stat. 1807.

164. Treaty of Mutual Understanding and Co-Operation, U.S.-Pan., Jan. 25, 1955, 6 U.S.T. 2273, 243 U.N.T.S. 211.

165. U.N. GAOR, 17th Sess., 1130th plen. mtg. ¶ 152, U.N. Doc. A/PV.1130 (Sept. 25, 1962).

166. U.N. SCOR, 28th Sess., 1704th plen. mtg. ¶ 56, U.N. Doc. S/PV.1704 (Mar. 21, 1973).

167. KONTOUT, *supra* note 14, at 76.

168. The Colombian representative was of the view that failure to revise the treaty "would be tantamount to maintaining in perpetuity situations of colonial domination and being left behind by history," noting that the Security Council had "made possible the necessary re-adjustment of old situations inherited from the past century" and the advent of a "new international order." U.N. SCOR, 28th Sess., 1696th plen. mtg. ¶¶ 139, 141, U.N. Doc. S/PV.1696 and Corr.1 (Mar. 15, 1973). The Cuban representative contended the 1903 treaty did "not truly exist in the light of international law and the Charter of the United Nations." *Id.* ¶ 189. The representative from El Salvador argued that revision of the 1903 treaty was necessary "to write off and cancel one of those historical mortgages and to do so by bringing to bear the entire body of ideas, principles and norms that the international community has evolved over the last decades." U.N. SCOR, 28th Sess., 1697th plen. mtg. ¶ 43, U.N. Doc. S/PV.1697 (Mar. 16, 1973). The Australian representative acknowledged "that the 1903 Convention contains features that are anachronistic and overdue for change" and the desire on the part of the Panamanian government and people "to have the agreement brought up to date to accord with present-day realities and international concepts." U.N. SCOR, 28th Sess., 1699th plen. mtg. ¶ 111, U.N. Doc. S/PV.1699 and Corr.1 (Mar. 19, 1973). The Canadian representative stated, "Reviewing developments since the first Convention 70 years ago, in 1903, it is clear that, as the poet said, the old order changeth, yielding place to new." U.N. SCOR, 28th Sess., 1700th plen. mtg. ¶ 173, U.N. Doc. S/PV.1700 (Mar. 19, 1973). *See also* KONTOUT, *supra* note 14, at 76-77 (quoting other representatives at U.N. Security Council meetings).

pressuring the United States to agree to a revision. Although the United States had no duty to alter the hugely beneficial treaty,¹⁶⁹ it negotiated new agreements designed to comply with the new customary international law.¹⁷⁰

Finally, a 1969 "permanent" fisheries convention between Morocco and Spain set the limit of the states' territorial seas at twelve miles from the baseline and specifically stipulated that future extensions of the territorial waters under international law would not modify the treaty unless the parties so agreed.¹⁷¹ In 1973—just four years later!—Morocco enacted domestic legislation with the effect of unilaterally abrogating the spirit, if not the letter, of the convention by claiming exclusive fishing rights up to seventy miles off its coast.¹⁷² After seizure and capture incidents and much negotiation, the states signed additional fisheries agreements in 1973,¹⁷³ 1977,¹⁷⁴ and 1983,¹⁷⁵ ultimately validating Morocco's claim to a seventy-mile fishing zone.¹⁷⁶

Admittedly, these examples are not the strongest evidence of the possibility of treaty modification by subsequently developed customary international law. First, all of these apparent conflicts between the two main sources of international legal obligations were ultimately resolved through supersession, not by recognition of subsequently developed customary international law. Accordingly, these examples might seem to support the claim that formal action is needed for treaty modification. Second, ascribing the need for new treaties entirely to the existence of new customary international law risks overstating the role the latter plays. While the legal environment had certainly changed, so had political circumstances. Following World War I and the demise of the Ottoman Empire, the balance of power in Eurasia shifted dramatically. The dawn of the postcolonial era may have emboldened Turkey, Egypt, and Panama and have encouraged colonial powers to be more accommodating. Finally, Francisco Franco died towards the end of 1975, ushering in a new democratic Spanish government with different aims and interests.

There is, however, some evidence that a new international legal

169. Malcolm E. Wheeler, Note, *Toward the Peaceful Modification of Treaties: The Panama Canal Proposals*, 21 STAN. L. REV. 938, 948 (1969).

170. *Id.*

171. Morocco-Spain Fishery Agreement, *supra* note 4, arts. 3, 7; see also KONTOU, *supra* note 14, at 68-71 (describing the evolution of Morocco and Spain's treaty relationship).

172. Dahir Portant Loi No. 1.73.211 du 2 mars 173 Fixant la Limite des Eaux Territoriales et de la Zone de Pêche Exclusive Marocaines [Morocco Decree-Law No. 173.211, 2 March 1973, Fixing the Limit of the Territorial Sea and Exclusive Fishing Zone], reprinted in 7 NEW DIRECTIONS IN THE LAW OF THE SEA 166 (Myron Nordquist et al. eds., 1980). The 1969 treaty referred only to "territorial waters" and not to "exclusive fishing zones." KONTOU, *supra* note 14, at 70-71.

173. Act of Rabat on the Spanish-Moroccan Negotiations Concerning Maritime Fisheries, Morocco-Spain, May 12, 1973, reprinted in 5 NEW DIRECTIONS IN THE LAW OF THE SEA 18 (Robin Churchill et al. eds., 1977).

174. *Espagne et Maroc: Approbation par le Congrès espagnol le 15 février 1978 de l'accord de pêche hispano-marocain du 17 février 1977*, 82 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1107-08 (1978).

175. *Espagne et Maroc: Signature de l'accord de pêche du 18 août 1983*, 88 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 231-32 (1984).

176. KONTOU, *supra* note 14, at 69-70.

environment influenced the negotiation of the subsequent agreements. Turkey, Egypt, and Panama—the “weaker” parties in their respective disputes—all invoked and relied heavily on new customary international law norms. In the case of the Capitulatory treaties, even states parties who stood to lose significant rights agreed that the treaties might be lawfully unilaterally abrogated—presumably due to the subsequently developed customary international law. In agreeing to renegotiate the U.S. relationship with Panama in 1974, Secretary of State Henry Kissinger noted the “profoundly transformed legal environment” and that the canal could no longer “operate[] under the terms of a treaty signed in 1903, when the realities of international affairs were still shaped by traditional precepts of power.”¹⁷⁷ Finally, during the various negotiations of the revised fisheries agreements, Spain never attempted to rely on its contracted-for rights under the original 1969 treaty,¹⁷⁸ suggesting an implicit acknowledgment that those treaty rights no longer carried significant legal weight in the face of contradictory new customary international law.

Additionally, recognizing the existence of new customary international law is “deeply entangled” with the making of new customary international law.¹⁷⁹ It is not simply a matter of states acknowledging a new customary rule and negotiating superseding treaties in its shadow. Rather, as Myres McDougal has described it, the process is one of “continuous interaction . . . in which the decision-makers . . . unilaterally put forward claims . . . and in which other decision-makers . . . weigh and appraise these competing claims . . . and ultimately accept or reject them.”¹⁸⁰ As a result, “[a]ny decision relating to the [customary international law] norm—even a decision that might reasonably be characterized as a ‘finding’—has some prescriptive effect.”¹⁸¹ The very fact that states considered, debated, or accepted the possibility of unilateral abrogation of the respective treaties contributed to the recognition of the customary international law upon which those abrogations would have been grounded—as well as the underlying possibility of unilateral treaty abrogation based on the development of new customary international law.

2. Reducing States Parties' Obligations

The submarine is considered a warship, subject to the laws of armed conflict governing surface warships.¹⁸² This law was clarified in part in the 1909 Declaration of London, which permitted the destruction of captured

177. Henry Kissinger, U.S. Sec'y of State, Address in Panama (Feb. 7, 1974), in DEP'T ST. BULL., Feb. 25, 1974, at 181, 181-82.

178. KONTOU, *supra* note 14, at 70.

179. Hakimi, *supra* note 41, at 156-163 (considering this process in light of the *Tadic* decision and the ICRC customary international humanitarian law database).

180. Myres S. McDougal, Comment, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 357 (1955).

181. Hakimi, *supra* note 41, at 158.

182. D.P. O'Connell, *International Law and Contemporary Naval Operations*, 44 BRIT. Y.B. INT'L L. 19, 45 (1970). In 1899, Great Britain, with Germany's support, unsuccessfully attempted to outlaw submarines as a weapon of war. *Id.*

merchant vessels only if the capturing vessel could not safely take the captured one into port for a prize hearing.¹⁸³ However, to sink a captured vessel, the capturing warship had to first ensure the safety of her crew and any passengers.¹⁸⁴ That submarines were necessarily endangered by taking captured ships to port (because their success and safety depended on stealth, not superior power) and physically incapable of taking on additional passengers was apparently irrelevant. When World War I broke out, Germany initially attempted to comply with these requirements.¹⁸⁵ As it lost ground, however, it gradually began to permit its submarine commanders to target merchant ships.¹⁸⁶ By early 1917, Germany was practicing unrestricted submarine warfare within its declared war zone.¹⁸⁷

At the 1922 Washington Conference after the war, Great Britain again tried, and again failed, to completely ban the use of submarines.¹⁸⁸ The participants did, however, adopt a general resolution that, among other things, prohibited the destruction of a merchant vessel "unless its crew and passengers have been placed in safety."¹⁸⁹ In 1930, the London Naval Treaty explicitly prohibited submarines from sinking potentially hostile merchant vessels without having first ensured the safety of their passengers, crew, and ship's papers.¹⁹⁰ These provisions were reiterated to the letter in the 1936 London Protocol,¹⁹¹ ratified by all naval powers, including Germany.¹⁹² This requirement was roundly criticized as "an unworkable ideal couched in ambiguous terms which did not address the practicalities of submarine warfare."¹⁹³

Notwithstanding the widespread agreement to the Protocol, in World War II, all naval participants with the means to do so (except Japan) engaged in some form of unrestricted submarine warfare.¹⁹⁴ After the war, the International Military Tribunal in Nuremberg found Grand Admiral Doenitz, the Commander in Chief of the German Navy, guilty of violating the London

183. Declaration of London Concerning the Law of Naval War arts. 48, 49, Feb. 26, 1909, 208 Consol. T.S. 338. Although all participants at the conference signed the Declaration, none ratified it.

184. *Id.* art. 50.

185. See O'Connell, *supra* note 182, at 46-48 (detailing Germany's internal debates regarding the legality of increasing unrestricted submarine warfare and international responses).

186. *Id.*

187. *Id.* at 48.

188. *Id.* at 49.

189. *Id.*

190. London Naval Treaty, *supra* note 2, art. 22.

191. Procès-verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, Nov. 6, 1936, 173 L.N.T.S. 353, 357 [hereinafter London Protocol] ("[A] warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured . . .").

192. Jane Gilliland, Note, *Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare*, 73 GEO. L.J. 975, 978 (1985).

193. Hays Parks, *Submarine-Launched Cruise Missiles and International Law: A Response*, 103 U.S. NAVAL INST. PROC. 120, 120 (1977).

194. Gilliland, *supra* note 192, at 985.

Protocol.¹⁹⁵ However, in light of widespread violations of the same regulation by British and U.S. forces, the Tribunal explicitly did not base Doenitz's sentence on this particular violation.¹⁹⁶ Accordingly, one scholar described the prohibitions of the London Protocols as "blue law[s]"—clear, but outdated and thus unenforceable rules.¹⁹⁷

Technically, the London Protocol's requirements remain in place today, binding all states parties.¹⁹⁸ However, subsequent and contradictory state practice has created a vast number of customary exceptions to the treaty rules. As noted in the *Max Planck Encyclopedia of Public International Law*:

[C]ustomary international law now provides that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II, imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship's papers before destruction of an enemy merchant vessel, *unless* the enemy merchant vessel persistently refuses to stop when duly summoned to do so; it actively resists visit and search or capture; it is sailing under convoy of enemy warships or enemy military aircraft; it is armed; it is incorporated into, or is assisting in any way the enemy's military intelligence system; it is acting in any capacity as a naval or military auxiliary to an enemy's armed forces; or the enemy has integrated its merchant shipping into its war-fighting effort and compliance with the London Protocol of 1936 would, under the circumstances of the specific encounter, subject the submarine to imminent danger or would otherwise preclude mission accomplishment.¹⁹⁹

The customary "exceptions" to the treaty law have essentially swallowed the rule. At least until the San Remo Manual was finalized in 1994,²⁰⁰ "submarine operations in times of war [were] governed by no legal text."²⁰¹ Instead, they

195. *Id.* at 988.

196. *Id.* at 988-89.

197. Alex A. Kerr, *International Law and the Future of Submarine Warfare*, 81 U.S. NAVAL INST. PROC. 1105, 1107 (1955). For an alternative reading of the Tribunal's decision, see Jon L. Jacobson, *The Law of Submarine Warfare Today*, in 64 INTERNATIONAL LEGAL STUDIES 205, 212 (Horace B. Robertson, Jr. ed., 1991).

198. London Naval Treaty, *supra* note 2, art. 23 (providing that the treaty would expire on December 31, 1936, with the exception of Article 22, which would "remain in force without limit of time").

199. J. Ashley Roach, *Submarine Warfare*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L., <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law9780199231690e412?rskey=ugUuAj&result=2&prd=OPIL> (Aug. 2009) (emphasis added); *see also* U.S. DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 8.2.2.2 (1989) (noting that "the rules of the 1936 London Protocol . . . must be interpreted in light of current technology . . . as well as the customary practice of belligerents that evolved during and following World War II" and listing circumstances when enemy merchant vessels may be attacked and destroyed); *id.* at 8.3.1.

200. The San Remo Manual was drafted in part to address the lack of clear law regarding submarines. *See* Louise Doswald-Beck, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, INT'L REV. RED CROSS, Nov.-Dec. 1995, at 583, 590.

201. O'Connell, *supra* note 182, at 52; *see also* Gilliland, *supra* note 192, at 991. *But see* Howard Levie, *Submarine Warfare: With Emphasis on the 1936 London Protocol*, 70 INT'L L. STUD. 293, 325 (1993) (concluding that, notwithstanding extensive violations, the "1936 London Submarine Protocol continues to be a valid and subsisting part of the law of war at sea").

Interestingly, one proponent of the continuing validity of the London Protocol nonetheless implicitly accepts that customary international law might modify the treaty. Wolff Heintschel von Heinegg, *The Law of Armed Conflict at Sea*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 463, 521 (Dieter Fleck ed., 3d ed. 2013) ("[I]n view of the continuing validity of the LondonProt 1936 and *since no rule of customary law to the contrary has developed*, submarines are subject to the

were regulated by subsequently developed customary international law, which had effectively rewritten the London Protocol to reduce states parties' obligations (and expand their rights) with regard to the lawful use of submarines.²⁰²

3. *Increasing States Parties' Obligations*

One hundred ninety-five states are party to the 1949 Fourth Geneva Convention. Of these, 173 are party to the 1977 First Additional Protocol,²⁰³ which expands the definition of international conflicts, extends many of the protections of the Conventions, and clarifies the applicability of certain customary norms. Specifically, Article 70 of the First Additional Protocol enlarges on the obligations associated with relief operations in nonoccupation situations, originally described in Article 23 of the Fourth Geneva Convention.

Article 23 of the Fourth Geneva Convention provides that states parties must "allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians" and "likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases."²⁰⁴ In brief, under Article 23, a state party must allow the free passage of a narrow category of items for all civilians and of a broader category of items for a smaller group of especially vulnerable civilians.

Article 70 of the First Additional Protocol provides that states parties to the treaty and to the conflict "allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel" to

the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, [if it] is not adequately provided with [food, medical supplies, clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population, and objects necessary for religious worship] In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.²⁰⁵

Article 70 thus requires the free passage of humanitarian personnel and far

same rules as surface ships." (emphasis added)).

202. I argue elsewhere that prohibitions on submarine warfare failed in part because submarines were uniquely effective at accomplishing certain military objectives and, due to the immutable characteristics of submarine's design, they were incapable of being used in compliance with the regulations. Crotoof, *Killer Robots*, *supra* note 42. To the extent treaties attempt to regulate new technologies without consideration of its architecture, they are similarly susceptible to modification by subsequently developed customary international law. *Cf.* Rebecca Crotoof, *Why the Ban on Permanently Blinding Lasers is Poor Precedent for a Prohibition on Autonomous Weapon Systems*, *LAWFARE* (Nov. 24, 2015, 7:00 AM), <https://www.lawfareblog.com/why-prohibition-permanently-blinding-lasers-poor-precedent-ban-autonomous-weapon-systems>.

203. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter First Additional Protocol].

204. Fourth Geneva Convention, *supra* note 123, art. 23.

205. First Additional Protocol, *supra* note 203, art. 70.

broader categories of relief supplies for *all* civilians, although especially vulnerable ones are accorded priority in distribution.

Additionally, Article 70 limits Article 23's possible exceptions. Article 23 permits states to limit the free passage of the consignments if it believes there are

serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.²⁰⁶

Meanwhile, under Article 70, the state party allowing passage "shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned."²⁰⁷

The International Committee of the Red Cross describes the Article 70 obligations as customary international law. Rule 55 of its customary international humanitarian law database states: "The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control."²⁰⁸ Rule 56 provides: "The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted."²⁰⁹ Assuming this characterization is correct, all states are bound under customary international law to comply with Article 70, despite the fact that twenty-two states parties to the Fourth Geneva Convention have not ratified the First Additional Protocol.

It has long been recognized that treaty law may evolve into new customary international law and thereby create international obligations for nonmember states. Usually, this is viewed as the creation of an international obligation where none previously existed.²¹⁰ But from another perspective, this is merely a lesser version of treaty modification by subsequently developed customary international law: a state has elected not to join a treaty regime, but

206. Fourth Geneva Convention, *supra* note 123, art. 23.

207. First Additional Protocol, *supra* note 205, art. 70.

208. Int'l Comm. Red Cross, *Rule 55, Access for Humanitarian Relief to Civilians in Need*, CUSTOMARY IHL DATABASE (2016), http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55.

209. Int'l Comm. Red Cross, *Rule 56, Freedom of Movement of Humanitarian Relief Personnel*, CUSTOMARY IHL DATABASE (2016), http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule56.

210. See, e.g., Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995, 1007 (2012) (noting that when customary international law evolves from treaty norms, it "is almost conceived of as a passive recipient of settled norms worked out through treaty negotiations against a tabula rasa").

it nonetheless may incur those same treaty obligations in the guise of customary international law. This runs directly counter to the traditional understanding that “if a state does not consent to an international treaty, it is clearly not bound by its provisions.”²¹¹

But here, something even more contentious is occurring. To the extent the new customary rules enlarge upon the treaty obligations expressed in the Fourth Geneva Convention, this is a situation where states’ treaty obligations have not only been modified, but have been substantively and substantially *increased* by subsequently developed customary international law. This customary “end run” around treaty law is highly controversial.²¹² However, at least in the case of Article 70, it seems to have occurred. States that have not ratified the First Additional Protocol are often admonished for actions that do not comply with Article 70.²¹³ Israel—which is party to the Fourth Geneva Convention, but not to the First Additional Protocol—has formally acknowledged this development: in the 2008 *Al-Bassiouni* case, Israel’s High Court of Justice observed that Israel accepted Article 70 as “customary international law,” imposing an obligation “to allow the passage of essential humanitarian goods to the Gaza Strip.”²¹⁴

Nor is this the only example of subsequently developed customary international law creating additional obligations contrary to existing treaty law. Monica Hakimi details how the International Criminal Tribunal for the Former Yugoslavia’s expansive *Tadic* decision²¹⁵ resulted in states assuming obligations they had explicitly rejected,²¹⁶ and customary international law regarding *non-refoulement* might require states to protect individuals who would not qualify as refugees under relevant treaties, extending state obligations beyond treaties’ explicit definitions for both signatories and nonsignatories.²¹⁷ In these circumstances, new customary international law increases state obligations notwithstanding the contradictory treaty—and

211. Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 488 (2005).

212. See, e.g., Kenneth Anderson, *My Initial Reactions to the ICRC Customary International Humanitarian Law Study*, KENNETH ANDERSON’S LAW OF WAR AND JUST THEORY BLOG (Nov. 14, 2005), <http://kennethandersonlawofwar.blogspot.com/2005/11/my-initial-reactions-to-icrc-customary.html>; see also Iain Scobbie, *The Approach to Customary International Law in the Study*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 15, 34 (Elizabeth Wilmshurst & Susan Breau eds., 2007) (“Can States be expected to accept as customary that which they have rejected as a conventional obligation?”).

213. See, e.g., Int’l Comm. Red Cross, *Practice Relating to Rule 55, Access for Humanitarian Relief to Civilians in Need* (2016), CUSTOMARY IHL DATABASE, https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule55.

214. HCJ 9132/07 *Al-Bassiouni Ahmed v. Prime Minister*, ¶¶ 13, 15 (2008) (Isr.) (unpublished). Similarly, Malaysia, which is also not a party to the First Additional Protocol, has argued that blockades are prohibited “if [they] [are] used to prevent the free passage of relief consignments.” U.N. GAOR, 65th Sess., 13th mtg. ¶¶ 8, 10–11, U.N. Doc. A/C.6/65/SR.13 (Oct. 10, 2010).

215. Prosecutor v. Tadić, Case No. IT-94-I-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

216. Hakimi, *supra* note 41, at 169.

217. See Deborah Perluss & Joan F. Hartman, *Temporary Refuge: Emergence of a Customary Norm*, 26 VA. J. INT’L L. 551 (1986).

thereby modifies it (provided the treaty obligation does not survive as *lex specialis*).²¹⁸

4. A Complex Relationship

The 1958 Convention on the High Seas provides that the “high seas” encompass “all parts of the sea that are not included in the territorial sea or in the internal waters of a State” and notes that “no State may validly purport to subject any part of [the high seas] to its sovereignty.”²¹⁹ This freedom of the high seas includes, *inter alia*, the freedom to fish.²²⁰ During the extended drafting period of the 1982 Law of the Sea Convention, however, it became clear that coastal states would soon obtain the right to exclude others from fishing in a 200-mile exclusive economic zone.²²¹ Accordingly, before the 1982 Convention took effect and formally superseded the 1958 Convention, states began unilaterally taking measures to exclude others from fishing in those waters.²²²

Oscar Schachter argues that this is an example of a situation where customary international law “replaced clear treaty obligations . . . without any formal abrogation of the existing treaties.”²²³ However, it also raises a chicken-and-egg issue: would the states have been willing to act unilaterally in violation of the 1958 Convention in the absence of the substantial agreement with regard to draft treaty articles of the 1982 Convention, which were poised to supersede the 1958 Convention? In addition to being a situation where customary international law modified treaty obligations, this is also an example of how different methods of updating a treaty may work in tandem to spur quicker change.

The relationship between the different approaches to treaty modification—by amendment, supersession, adaptive interpretation, and subsequently developed customary international law—is necessarily a complicated one. As evidenced in many of the foregoing examples, these various methods will rarely operate in isolation. Turkey, Egypt, and Panama relied on new customary international law regarding state sovereignty to pressure reluctant treaty partners to agree to new, superseding arrangements. Similarly, Canada and France phased out French fishing rights in Canadian waters in recognition of the evolving customary law of the sea, and France and Great Britain renegotiated treaties based on new customary international law regarding extradition. Changes in the customary law of armed conflict persuaded most states parties to the CCCW that formal amendment was required. And clarifying and gap-filling adaptive interpretations often accommodate and guide the development of state conduct that might otherwise

218. See *infra* Part III.B.4.

219. Convention on the High Seas arts. 1, 2, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

220. *Id.* art. 2.

221. SCHACHTER, *supra* note 36, at 77-78.

222. *Id.*

223. *Id.*

ripen into contradictory customary international law. Treaty modification by customary international law is not merely an alternate route by which outdated treaties are updated; it may also prompt states to engage in more traditional means of treaty modification.

5. *Addressing an Alternative Characterization*

In all of the above examples, it appears that subsequently developed customary international law affected treaty law—either by allowing states to pressure their treaty partners into altering outdated treaty obligations or by reducing or increasing states parties' obligations, notwithstanding explicit and contradictory treaty text. To the extent these and other similar examples have been acknowledged in scholarship, however, they tend to be characterized as subsequent state practice evidencing agreement to modify a treaty—and not as modification based on new customary international law. Why is this distinction important?

Recall the Hague Regulation and Geneva Convention provisions prohibiting occupying states from engaging in anything other than minimal interference with the governing structure of the occupied territory.²²⁴ Butler described current contradictory state action as subsequent practice interpreting the treaties;²²⁵ however, it might also be seen as subsequent practice evidencing state party agreement to modify the treaties or subsequently developed customary international law modifying the treaties. Which is the best characterization of what actually occurred? Assuming for present purposes that one cannot credibly make the case that current state conduct is in keeping with the object and purpose of the treaties,²²⁶ and assuming that modification by subsequent practice evidencing state party agreement is legitimate,²²⁷ today's state conduct is best explained as lawful due to a new customary international law norm permitting an occupier's involvement in certain aspects of an occupied territory's political processes.

Because most states will be party to constitutive treaties like the Hague and Geneva Conventions, subsequently developed customary international law might initially appear indistinguishable from subsequent practice evidencing agreement to modify a multilateral treaty. Some states parties to a treaty will engage in practices apparently at odds with their treaty obligations, some states parties may complain about such conduct, and most states parties will remain silent. Over time, however, once-contested practices—here, interference with an occupied territory's political process—will face less and less criticism, until it seems that a general consensus has arisen that the practices are permissible,

224. Butler, *supra* note 122, at 511-14.

225. *Id.* at 506-07.

226. My aim here is not to definitively determine the object and purposes of the Hague Regulation and Geneva Conventions, but rather to highlight the distinction between subsequent practice evidencing agreement to a modification and modification by customary international law in multilateral treaty regimes.

227. See *supra* Part II.C.4.

notwithstanding the apparently contradictory treaty text. Whether this process is characterized as subsequent state practice evidencing agreement to a modification or as subsequently developed customary international law modifying a treaty might therefore appear to be a difference of terminology only, with little practical import.

From a doctrinal standpoint, however, the legitimacy of the modification hinges on this distinction. As discussed earlier, it will be difficult—if not impossible—in a multilateral regime to establish that state party conduct actually reflects uniform agreement to a treaty modification. Due to the sheer number of states parties, most state consent to a modification must necessarily be inferred, but conditions will rarely be such that state party silence or inaction may legitimately be characterized as tacit consent. To purport that contradictory state party conduct is actually subsequent practice manifesting agreement regarding a modification undermines the legitimacy of an otherwise justifiable possibility of treaty modification through subsequent practice.²²⁸ To the extent that proposition diminishes the standard for tacit consent to a treaty modification, it may even invite abuses in the bilateral context of treaty modification by subsequent practice—as arguably occurred in the *Preah Vihear* case.²²⁹

B. Doctrinal Arguments

When a treaty obligation is fundamentally at odds with a subsequently developed customary international law, which source of international legal obligations should guide a state's behavior? The treaty provision, to which the state explicitly consented? Or the norm of customary international law, which may more accurately represent the current and most practical rule? This section considers various doctrinal arguments for which source of legal obligations should prevail when an older treaty and a new customary obligation conflict.

1. Consent Theory

The primary argument for why a treaty obligation should never be modified by a new norm of customary international law is grounded in the theory that all international law is based on state consent: states consent explicitly to the assumption of treaty obligations and consent only tacitly to their customary international law obligations.²³⁰ Accordingly, “[i]nternational conventions are the best evidence of the will of states, and thus are considered the primary source of international law.”²³¹

228. Cf. JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW THE WTO RELATES TO OTHER RULES OF INTERNATIONAL LAW* 143 (2003) (distinguishing between treaty modification by desuetude and subsequent state practice, which are grounded in implied state consent, and treaty modification by subsequently developed customary international law, which is due to the development of new law).

229. See *supra* text accompanying notes 134-135.

230. See, e.g., HENKIN, *supra* note 12, at 26-28; Glennon, *supra* note 11, at 941.

231. Walter G. Sharp, Sr., *The Effective Deterrence of Environmental Damage During Armed*

But this argument carries weight only to the extent one accepts consent theory as the sole explanation for the legitimacy of the entire international legal system. While it is an appealing theoretical solution to the paradox of why states can be both sovereign entities and subject to rules, it is internally inconsistent. Why can treaties sometimes bind nonconsenting third states? Why may inattentive states be bound by new customary norms, and why are new states bound by old norms to which they never consented? Why can't a post-regime-change state—or, frankly, any state—unilaterally revoke its consent to be bound by treaty or customary international law? For these and a host of other reasons, consent theory is increasingly coming under fire.²³² While a full investigation of the problems with consent theory is beyond the scope of this Article, the fact that customary international law does seem able to modify treaty obligations provides yet another example of why consent theory, standing alone, does not fully explain how the international legal system operates and evolves.

In an attempt to resolve the gap between theory and reality, some consent theorists have proposed an alternative understanding of what is happening when subsequently developed customary international law modifies a treaty. They suggest that, because customary international law is grounded in tacit state consent, it can modify earlier treaty law because such modification is made with the consent of the states parties.²³³ For example, Michael Akehurst contends that “subsequent custom can terminate a treaty only when there is clear evidence that that is what the parties intend.”²³⁴

Even assuming that the explicit consent states express in treaties and the tacit consent states are presumed to give new customary international law norms should be weighted equally,²³⁵ the claim that the binding nature of customary international law is justified through states' tacit consent cannot survive closer scrutiny. For the theory of tacit consent to justify the binding nature of customary international law, it must jettison the requirements that the

Conflict: A Case Analysis of the Persian Gulf War, 137 MIL. L. REV. 1, 6 (1992); see also MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 11 (4th ed. 2003) (arguing that treaties' preeminence with regard to customary international law “is justified because most treaties so plainly show both the terms of international legal rules and the consent of states to be bound by such rules”); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 438 (1983) (describing treaty norms as having “once been regarded as the archetypal rule of international law because [they are] the purest expression of classic consensualism”).

232. See *supra* note 15 for a review of criticisms.

233. See e.g., KONTOU, *supra* note 14, at 20 (observing that there is no hierarchy between treaties and customary international law because they are “equivalent expressions of [states'] consent to be bound internationally”); Akehurst, *supra* note 14, at 275 & n.5 (citing “writers who regard custom as an implied agreement between States”); Kerstin Odendahl, *Article 39: General Rule Regarding the Amendment of Treaties*, in VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 699, 704 (Oliver Dörr & Kirsten Schmalenbach eds., 2012) (characterizing modification by subsequently developed customary international law as based on “tacit agreement”); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 n.4 (1987) (“Provisions in international agreements are superseded by principles of customary law that develop subsequently, where the parties to the agreement so intend.”).

234. Akehurst, *supra* note 14, at 276.

235. Cf. SIMMONS, *supra* note 119, at 80.

consent is given intentionally, knowingly, and voluntarily—in short, the moral basis for why consent creates a binding legal obligation.²³⁶

2. *A Battle of Norms*

The conflict between the treaty provision and subsequently developed customary international law might be reconceived as a conflict between customary norms. One of the most fundamental rules of the international legal structure is *pacta sunt servanda*—the customary rule, codified in the Vienna Convention,²³⁷ that agreements must be kept. Thus, the conflict might be described as a conflict between two customary rules: *pacta sunt servanda* and the specific customary norm at issue. Because *pacta sunt servanda* is such an essential rule—indeed, many scholars consider it to be *jus cogens*, which implies that it can be modified only by another rule of equivalent weight²³⁸—it (and, by extension, the treaty provision) should prevail over lesser conflicting customary international law norms. Only when the conflicting customary norm is sufficiently fundamental—as was the case with Turkey's and Egypt's challenges to the Capitulatory regimes, which were grounded on the new but fundamental customary norm of sovereign state rights—will it present a real challenge to *pacta sunt servanda*.

One benefit to this argument is that it provides a theoretical explanation for why international tribunals generally privilege treaty text over contrary subsequently developed customary international law.²³⁹ However, this analysis also invites the question of how to determine which of two significant conflicting norms are more fundamental to the working of the international legal system, a question that may require comparing apples to oranges.²⁴⁰ Nor does it explain why new customary norms that are clearly inferior to *pacta sunt servanda*—like those regarding the use of submarines—are accepted and thus apparently acceptable.

3. *Arguments Grounded in the Vienna Convention*

The Vienna Convention on the Law of Treaties provides the laws regarding how treaties are created, interpreted, modified, and terminated. It has

236. Cf. *id.* at 77.

237. VCLT, *supra* note 21, pmbl., art. 26.

238. See, e.g., JANIS, *supra* note 231, at 66. The Vienna Convention defines a “*jus cogens*” or “peremptory norm” as one “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” VCLT, *supra* note 21, art. 53.

239. See, e.g., KONTOU, *supra* note 14, at 132-33; MAX SØRENSEN, LES SOURCES DU DROIT INTERNATIONAL: ETUDE SUR LA JURISPRUDENCE DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE [THE SOURCES OF INTERNATIONAL LAW: STUDY ON THE JURISPRUDENCE OF THE PERMANENT INTERNATIONAL COURT OF JUSTICE] (1946) (concluding that judges of the Permanent International Court of Justice tended to treat the sources of law listed in Article 38 of the Statute of the Permanent International Court of Justice as a hierarchy, thus favoring treaty law over customary international law).

240. Cf. Dinstein, *supra* note 143, at 426 (discussing issues associated with a “clash between two norms of *jus cogens*,” and concluding that “it may be debatable which one ought to carry the day”).

114 states parties and 45 signatories,²⁴¹ and much of its content has been recognized as customary international law.²⁴² As it is generally acknowledged as the definitive description of the law of treaties, it is natural to turn to it to determine whether treaty modification by subsequently developed customary international law is permissible. Unfortunately, arguments grounded in the Vienna Convention are inconclusive, as its text can be read both to forbid and to permit such modification.

i. The Im/possibility of Modification by Subsequently Developed Customary International Law

The Vienna Convention states that “[a] treaty may be amended by agreement between the parties. The rules laid down [regarding the conclusion and entry into force of treaties] apply to such an agreement except in so far as the treaty may otherwise provide.”²⁴³ With regards to multilateral treaties, unless the treaty itself provides otherwise,

Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

- (a) The decision as to the action to be taken in regard to such proposal;
- (b) The negotiation and conclusion of any agreement for the amendment of the treaty.²⁴⁴

Additionally, an “amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement.”²⁴⁵ Finally, the International Law Commission—which provided draft articles to the participants in the Vienna Conference—excluded from its final draft articles an earlier one that would have permitted treaty modification by “subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding on all parties.”²⁴⁶

Given this text and history, some might argue that since the Vienna Convention does not explicitly recognize the possibility of bilateral or multilateral treaty modification by subsequently developed customary international law, any such modification is impermissible. To the extent states appear to believe certain actions that cannot be squared with their treaty obligations are nonetheless lawful, they are wrong.

One response is that the Vienna Convention was not intended to

241. *Vienna Convention on the Law of Treaties*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en (last visited Apr. 1, 2016).

242. See, e.g., *Vienna Convention on the Law of Treaties*, U.S. DEP’T OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited April 11, 2016) (explaining that although the United States has not ratified the treaty, it “considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties”).

243. VCLT, *supra* note 21, art. 39.

244. *Id.* art. 40(2).

245. *Id.* art. 40(4).

246. ILC Report, *supra* note 80, at 236.

comprehensively describe the law of treaties.²⁴⁷ The Convention never mentions the possibility of treaty termination by desuetude or obsolescence, for example, but both are recognized by states.²⁴⁸ Like desuetude and obsolescence, the possibility of modification by subsequently developed customary international law may remain an element of the uncoded customary law of treaties.

Alternatively, it may well be that the Vienna Convention articles governing treaty modification were never intended to be exclusive. It certainly never expressly forbids modification by subsequently developed customary international law. And, unlike the rules regarding termination, suspension, or party withdrawal—all of which “may take place *only* as a result of the application of the provisions of the treaty or of the present Convention”²⁴⁹—the rules regarding amendment and modification do not use exclusionary language. Accordingly, they might have been intended to describe one of multiple possible routes to treaty modification.²⁵⁰

This understanding is bolstered by the reasons given for the International Law Commission’s decision to remove the draft article regarding modification by subsequently developed customary international law.²⁵¹ It was not that they believed it was impossible for new customary international law to effect a modification; rather, the Commission “concluded that the question would in any given case depend to a large extent on the particular circumstances and on the intentions of the parties to the treaty.”²⁵² Furthermore, the Commission determined “that the question formed part of the general topic of the relation between customary norms and treaty norms, which is too complex for it to be safe to deal only with one aspect of it in the present article.”²⁵³ By deciding to remain silent on the relationship between treaty and customary international law, the Commission did not foreclose the possibility that the latter could modify the former.²⁵⁴

247. Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 427, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter ILC Fragmentation Report] (observing that “the Convention does not purport to be an exhaustive statement of interpretative techniques—there is no mention, for example, of *lex specialis* or *lex posterior*”); see also SINCLAIR, *supra* note 128, at 6 (observing that the Convention does not address agreements between states and international organizations; nonwritten agreements between states; or questions relating to the succession of treaties, state responsibility, or the effect of the outbreak of hostilities on treaties); *id.* at 257 (noting that subjects not covered by the Vienna Convention “will continue to be regulated by customary law, including any new developments in customary law brought about by the general practice of States accompanied by the *opinio juris*”).

248. Marcelo G. Kohen, *Desuetude and Obsolescence of Treaties*, in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 350, 350 (Enzo Cannizzaro ed., 2011).

249. VCLT, *supra* note 21, art. 42 (emphasis added).

250. See VILLIGER, *supra* note 14, at 200 (suggesting that the Vienna Convention is comprehensive only to the extent it provides “for all *contractual* means of terminating and amending treaties”).

251. ILC Report, *supra* note 80, at 236. The provision was deleted according to a vote of 53 to 15, with 26 abstentions. Akehurst, *supra* note 14, at 277.

252. ILC Report, *supra* note 80, at 236.

253. *Id.*

254. See Akehurst, *supra* note 14, at 277 (noting that, of the fifty-three votes to delete the draft article, only ten stated that their vote was based on the belief that the draft provision was not in

Of course, at a certain point the modification of assorted treaty provisions may verge on terminating or suspending the treaty as a whole. Interestingly, the Vienna Convention does recognize the possibility of a treaty becoming void as a result of subsequently developed customary international law, if such law qualifies as *jus cogens*. The Convention provides that, should "a new peremptory norm of general international law emerge[], any existing treaty which is in conflict with that norm becomes void and terminates."²⁵⁵ Accordingly, under the Convention, it may well be that treaties may also be modified by subsequently developed customary international law.

A third rejoinder could be that, to the extent it forbids the modification of treaties by customary international law, the Vienna Convention itself has since been modified.²⁵⁶ Granted, states have not explicitly recognized the possibility of treaty modification by subsequently developed customary international law. But the fact that states have not protested customary modifications when they do occur may serve as evidence of state practice and *opinio juris sive necessitatis* that such modification is permissible. For example, as discussed in greater detail below, critics of the argument that a new norm of humanitarian intervention has modified the U.N. Charter's prohibition on a state's unilateral use of force tend to argue that no such customary norm has arisen—not that such a norm could not modify the Charter.²⁵⁷

ii. Interpretation in Light of Customary International Law

Alternatively, those seeking to reconcile what appears to be treaty modification by subsequently developed customary international law with the text of the Vienna Convention may look to Article 31(3)(c), which provides that, along with a treaty's context, "[a]ny relevant rules of international law applicable in the relations between the parties" should be taken into account when interpreting a treaty.²⁵⁸ As the ICJ has observed, this would include new customary international law: the interpretation of a treaty "cannot remain unaffected by the subsequent development of law [including] by way of customary law."²⁵⁹

While there is a long history of interpreting treaties in light of new customary international law, this will be a plausible description of what has

accordance with existing law—three thought the relationship between treaty and customary law was outside the scope of the Convention, eleven said the rule was undesirable, and two advocated deletion without providing reasons); see also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 12 (3d ed. 2013) (observing that the Commission did not view its mandate as extending to the relationship between treaty and customary international law).

255. VCLT, *supra* note 21, art. 64.

256. See Akehurst, *supra* note 14, at 277 (suggesting this possibility); see also SINCLAIR, *supra* note 128, at 257 (observing that customary international law on treaties will continue to develop alongside the Vienna Convention).

257. See *infra* Part IV.C.

258. VCLT, *supra* note 21, art. 31(3)(c).

259. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21).

occurred only when the treaty is sufficiently flexible to accommodate these interpretations. To do otherwise is to modify, not interpret, the treaty.²⁶⁰ For example, it requires stretching the treaty beyond the breaking point to read the 1936 London Protocol as permitting the various customary exceptions allowing submarines to target merchant vessels that later arose. Collectively, the exceptions permit precisely what the treaty forbade—using submarines to sink merchant ships, notwithstanding their inability to provide for the safety of the ship's crew, passengers and papers²⁶¹—and thus they cannot be justified as gap-filling interpretations in line with the treaty's object and purpose (or text, or intent of the drafters). Where the new understanding of the states parties' legal obligations cannot be reconciled with the treaty's object and purpose, treaty "interpretation" in light of new customary international law is more accurately described as treaty modification—and in such cases, Article 31(c)(3) is inapplicable.

iii. *A Fundamental Change in Circumstances*

Some consider Article 62, which provides for treaty termination or withdrawal in light of "a fundamental change in circumstances,"²⁶² as providing legal justification for treaty termination in light of subsequently developed customary international law.²⁶³ While the *travaux préparatoires* might imply that Article 62 was meant to apply only to changes in factual, and not legal, circumstances,²⁶⁴ the treaty certainly allows for a teleological reading that would permit an interpreter to consider a development in customary international law "a fundamental change in circumstances."

Article 62, however, includes a number of qualifiers limiting when it may be invoked. Some hurdles will be relatively easy for new customary international law to surmount: the change must not have been foreseen, the prior-existing circumstances must have constituted an essential basis for the consent of the parties, and the effect of the change must "radically" transform obligations to be performed.²⁶⁵ Nor can Article 62 be invoked as the basis for termination or withdrawal from a treaty establishing a boundary.²⁶⁶ Thus, were the Vienna Convention in force in the early twentieth century, Turkey and Egypt could have invoked Article 62 to justify the suspension of the Capitulatory regimes. To the extent the Panama Canal Treaty established a boundary, however, Panama might have had more difficulty in doing so.

Most importantly, Article 62 does not apply "[i]f the fundamental change

260. See *supra* Part II.C.4.

261. See *supra* note 191.

262. VCLT, *supra* note 21, art. 62.

263. See KONTOU, *supra* note 14, at 32-33 & nn.88-93 (citing scholars).

264. *Id.* at 34; see also *Fisheries Jurisdiction (U.K. v. Ice.)*, Jurisdiction, 1973 I.C.J. 49, ¶ 32 (Feb. 2) (noting that "changes in the law may under certain conditions constitute valid grounds for invoking a change of circumstances affecting the duration of a treaty").

265. VCLT, *supra* note 21, art. 62(1).

266. *Id.* art. 62(2)(a).

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.”²⁶⁷ A state that contributed to the development of a new norm by breaching treaty commitments could not then rely on the newly developed norm to justify a treaty modification under Article 62. However, in the face of existing law, new contradictory customary international law can develop only through state breaches.²⁶⁸ Article 62 therefore seems to create a Catch-22. A state grounding an action that would otherwise constitute a treaty breach in new customary international law is contributing to state practice supporting that law’s existence—which, in turn, means that the state cannot invoke it as a fundamental change in circumstances.

4. *Lex Posterior and Lex Specialis*

The best doctrinal argument for the possibility of treaty modification by subsequently developed customary international law is based on the principles of *lex posterior* and *lex specialis*. Not only do they explain why customary international law may displace treaty law in the absence of universal state party consent, they also provide guidance as to when certain treaty provisions may survive.²⁶⁹

Lex posterior derogat legi priori is the principle that the most recently developed rule prevails over prior law.²⁷⁰ Domestically, one normative justification for this principle is that it represents the latest, and thus most authoritative, statement of a recognized lawmaker. In the international legal order, where no single state has rulemaking authority, other justifications—such as the fact that the later-in-time law will be more responsive to current circumstances—carry more weight. The principle is well-established as “a principle of interpretation or conflict-solution in international law.”²⁷¹

Despite their differing sources of authority,²⁷² treaty and customary international law are considered coequal sources of international legal obligations.²⁷³ Accordingly, later-in-time customary international law can

267. *Id.* art. 62(2)(b).

268. See CASSESE, *supra* note 14, at 157-58 (discussing how breaches based on *opinio necessitatis* evolve into breaches based on *opinio juris sive necessitatis*); see also D’AMATO, *supra* note 20, at 97-98; VILLIGER, *supra* note 14, at 210.

269. This Subsection presents a simplified analysis of these two principles; in practice, their application will require a nuanced analysis. Hans Aufricht, *Supersession of Treaties in International Law*, 37 CORNELL L. REV. 655, 700 (1952); see also ILC Fragmentation Conclusions, *supra* note 9, at 409.

270. The substantive content of the later-in-time norm is irrelevant to the question of whether it has displaced pre-existing treaty text. While the substantive content may increase the likelihood of a norm’s evolution into customary international law, it is a problematic basis for its legitimacy. As evidenced by many debates in international human rights law, the weight assigned to various substantive norms can vary greatly from culture to culture, state to state, or even from person to person.

271. ILC Fragmentation Report, *supra* note 247, ¶ 225.

272. See *supra* note 19.

273. See, e.g., CASSESE, *supra* note 14, at 154; KONTOU, *supra* note 14, at 23; Bos, *supra* note 14, at 337 (describing treaty and custom as “intrinsically equivalent”); Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 669 (1986) (“Conventional doctrine

displace an earlier treaty provision as the binding *lex posterior*.²⁷⁴ For example, to the extent customary norms deriving from Additional Protocol I and subsequent state conduct expanded states parties' legal obligations under the Fourth Geneva Convention, they appear to have done so as *lex posterior*.

Meanwhile, *lex specialis derogat legi generali* is the principle that, when two laws govern the same factual situation, a law governing the specific subject matter overrides a law governing the general matter. The *lex specialis* principle is justified on the grounds that the more concrete and specialized law "often takes better account of the particular features of the context in which it is to be applied than any applicable general law," "[i]ts application may often create a more equitable result," and "it may often better reflect the intent of the legal subjects."²⁷⁵ Thus, in certain situations, subsequently developed customary international law may supplant treaty law as both the *lex posterior* and as the *lex specialis*.²⁷⁶ This appears to be what occurred in submarine warfare: the new customary exceptions were both later-in-time and more specific than the preexisting treaty text.

Of the few scholars who have considered the issue, Mark Villiger is the strongest proponent of this approach. He argues that "the formation of a new customary rule implies desuetude of the original conventional rule. . . . In other words, inherent in the formation of a new customary rule is the obligation that the incompatible conventional rule is no longer applied and, hence, ceases to exist."²⁷⁷ His reasoning, however, is grounded in the assumption that customary international law requires "uniform"—and not generalized—state practice, and so his argument is circular: customary international law can modify only a treaty provision that states have uniformly stopped enforcing,²⁷⁸ which would erase the distinction between subsequent practice evidencing agreement to a modification and modification by subsequently developed customary international law.²⁷⁹

regards both types of law as equally authoritative."); Weil, *supra* note 231, at 423; Christopher Greenwood, *Sources of International Law: An Introduction* (2008), http://legal.un.org/avl/pdf/ls/Greenwood_outline.pdf; Tullio Treves, *Customary International Law*, MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. (Nov. 2006), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393#law-9780199231690-e1393-div1-5>; see also AUST, *supra* note 254, at 12 ("International law does not contain any principle of *acte contraire*, by which a rule can be altered only by a rule of the same legal nature."); VILLIGER, *supra* note 14, at 59 (same).

Article 38 of the ICJ Statute, which is widely regarded as the most authoritative description of the sources of international law, lists "international conventions" before "international custom." Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. However, most scholars agree that this listing does not establish a hierarchy among these sources. See, e.g., JORGE CASTAÑEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS 227* (Leland M. Goodrich & William T.R. Fox eds., Alba Amoia trans., 1969); VILLIGER, *supra* note 14, at 57-58.

274. See CASSESE, *supra* note 14, at 154; KONTOU, *supra* note 14, at 20, 23; VILLIGER, *supra* note 14, at 59-60; Bos, *supra* note 14, at 337.

275. ILC Fragmentation Conclusions, *supra* note 9, at 409.

276. CASSESE, *supra* note 14, at 154; VILLIGER, *supra* note 14, at 59, 207; Bos, *supra* note 14, at 337.

277. VILLIGER, *supra* note 14, at 206.

278. See *id.*

279. See *supra* Part III.A.5.

This Article's analysis is more radical, in that it presumes that customary international law may modify a treaty even without universal acceptance of the new customary rule.²⁸⁰ Villiger's account still gives deference to state consent, insofar as he presumes that a treaty cannot be modified by subsequently developed customary international law absent universal agreement; in contrast, this Article argues that one of the benefits of such modification is that absolute agreement is not necessary, thereby dispensing with the holdout problem inherent to treaty modification under the Vienna Convention's consent-based rules. Accordingly, because a single state will not be able to prevent action supported by a supermajority of members of the international legal order, treaty modification by subsequently developed customary international law may sometimes hew more closely to the international consensus, if one exists, than consent-based forms of treaty modification.

A proponent for the superiority of treaty text might attempt to tackle customary international law on its own terms and claim that the treaty provision should be viewed as evidence of the states parties' "persistent objection" to the development of a customary international law norm. While treaty law is an "opt-in" system, customary international law has a limited "opt-out" element. Theoretically, as a norm evolves into controlling custom, a state may avoid becoming bound by steadfastly contesting the norm's existence or its status as customary international law. The United States might have argued that its treaty with Panama regarding the Panama Canal, for example, evidenced its objection to the developing norms of certain sovereign state rights. However, in the absence of other state action contesting the subsequently developed customary norm, asserting prior-existing treaty text alone is unlikely to be recognized as a persistent objection, especially in the face of a principle supported by a majority of states in the international community.²⁸¹

A better argument for why treaty law sometimes survives is one based in *lex specialis*. Usually, *lex specialis* is presumed to prevail over *lex generalis*, even when the more general law is also *lex posterior*.²⁸² In some situations, new customary international law will still be *lex generalis*. Meanwhile, certain treaties—and particularly bilateral treaties—may be intended to describe the specific legal rights or obligations of states, notwithstanding a changing customary backdrop.²⁸³ When in conflict with a broad customary international

280. Cf. ILC Fragmentation Conclusions, *supra* note 9, at 416 (stating that the *lex posterior* principle cannot be applied in treaty law when parties to a subsequent treaty are not identical to the parties of an earlier treaty).

This Article's position implicitly adopts an understanding of international legal agreements as more akin to domestic legislation (where the *lex posterior* applies) than consent-based contract law (where *lex prior* will prevail). Cf. ILC Fragmentation Report, *supra* note 247, ¶ 226 n.296, ¶ 241.

281. See David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 967 (1986).

282. See CASSESE, *supra* note 14, at 154; Bos, *supra* note 14, at 337; see also ILC Fragmentation Report, *supra* note 247, ¶ 61 (discussing how *lex specialis* is generally accepted as "a valid maxim of interpretation or conflict-solution technique in public international law"). But see KONTOU, *supra* note 14, at 24 & n.37 (citing scholars who believe that "*lex posterior* always repeals the *lex prior*, even if the prior rule is more specific").

283. See Special Rapporteur for the Law of Treaties, *Sixth Rep. on the Law of Treaties*, Int'l

law norm that applies to all states, these treaty obligations may survive as *lex specialis*. This might explain why Canada exempted France, which enjoyed the right to fish in Canadian territorial waters under a 1904 treaty, from its 1964 Act extending its exclusive fishing zone in accordance with changed customary norms.²⁸⁴

Additionally, the nature and content of a treaty may affect whether it is likely to ever be modified by subsequently developed customary international law. Treaties constitutive of an international organization, treaties establishing boundaries, and perhaps even treaties on certain subject matters are unlikely to be altered by subsequently developed customary international law, simply because states are unlikely to engage in the conflicting conduct necessary to establish a new norm.

When there is a question as to whether a specific treaty provision has been automatically superseded by subsequently developed customary international law, the states involved would ideally address the issue directly, as did the parties to the Capitulatory regimes. Nancy Kontou suggests four requirements for when a new norm of customary international law may be invoked as grounds for treaty modification:

- (i) it is incompatible with the treaty provisions;
- (ii) it is different from the customary international law in force at the time of the conclusion of the treaty; and
- (iii) it is binding upon all parties to the treaty, unless
- (iv) the parties intended that the treaty should continue applying as special law.²⁸⁵

In determining what the parties intend, “what counts is the practice followed *inter se* by the parties to the treaty.”²⁸⁶ A state’s conduct with respect to nonmember states and other states’ conduct “may give rise to a rule of customary law, but such a rule has no effect on the treaty unless it is followed by parties to the treaty in their relations with one another.”²⁸⁷

Presumably, Kontou would place the burden of proof for these elements on the party arguing for treaty modification. Doing so, however, would not pay appropriate deference to the fact that there is no hierarchy between treaty and customary international law. Accordingly, in cases of disagreement, the burden is more appropriately assumed by the party claiming that the treaty should

Law Comm’n, U.N. Doc. A/CN.4/186 & Add.1-7 (Mar. 11, Mar. 25, Apr. 12, May 11, May 17, May 24, June 1, June 14, 1966) (by Humphrey Waldock), *reprinted in* [1966] 2 Y.B. Int’l L. Comm’n 51, 90-91, A/CN.4/SER.A/1966/Add.1 (“The very object of a bilateral treaty or of a treaty between a small group of States is not infrequently to set up a special legal régime between the States concerned and sometimes a régime which derogates from the existing customary law. Accordingly, to say that the emergence of a new rule of customary law, binding on the parties as a general rule, is necessarily to modify the particular relations which they have set up between them may defeat their intention.”); *see also* Dinstein, *supra* note 143, at 405.

284. *See supra* text accompanying notes 69-72.

285. KONTOU, *supra* note 14, at 146.

286. Akchurst, *supra* note 14, at 276.

287. *Id.*

remain in force as *lex specialis*.²⁸⁸ In most situations, this burden will be relatively easy to meet.²⁸⁹

* * * * *

As constitutive multilateral treaties age and new customary international law develops, subsequently developed customary international law will sometimes modify states' treaty obligations. There are a number of unsatisfying arguments for and against such treaty modification. Consent theory and the "battle of norms" theory cannot adequately explain how treaty and customary international law interact in practice. The Vienna Convention is inconclusive: it can be read both to forbid and to permit such modification.

The best doctrinal argument for why such modification can occur is grounded in the *lex posterior* and *lex specialis* principles. Not only do they explain why customary international law may legitimately displace treaty law in the absence of universal state party consent, but they also provide guidance as to when certain treaties may survive. And, as discussed in the following Part, in some cases modification by subsequently developed customary international law may better reflect the consensus of the international community than consent-based means of treaty modification.

IV. MORE CONSENSUAL THAN CONSENT

Much of this Article has been devoted to demonstrating that treaties have been modified by subsequently developed customary international law and arguing that such modifications are legitimate. But while it is relatively easy to identify examples of such modification in retrospect, a state wishing to act contrary to accepted understandings of its treaty obligations can rarely point to well-established, conflicting customary international law. Instead, assuming it wishes to act lawfully and that formal modification is infeasible, the state is faced with a choice between advancing an adaptive interpretation (which might actually work a modification) and arguing that an emerging norm has ripened into new customary international law and modified the treaty.²⁹⁰

Adaptive interpretations derive their authority from their presumed fidelity to the treaty, and by extension, to state consent. But, in practice, a state arguing for an adaptive interpretation of a treaty actually has great leeway in justifying a highly controversial action. In contrast, a state grounding its legal arguments in the existence of a new norm of customary international law will

288. PAUWELYN, *supra* note 228, at 141.

289. *Id.* at 141-42.

290. Alternatively, of course, a state might decide to act, notwithstanding the fact that it has no legal justification. It must then determine how to present its violation. One option is to simply ignore the law; the other is to acknowledge the violation but describe it as a contribution to the evolution of a new customary international law. While either approach equally works a violation and may be equally precedential, there are nonetheless important distinctions between them. See, e.g., André Nollkaemper, *Syria Insta-Symposium: André Nollkaemper—Intervention in Syria and International Law: Inside or Out*, OPINIO JURIS (Sept. 1, 2013, 3:00 AM), opiniojuris.org/2013/09/01/syria-insta-symposium-andre-nollkaemper-intervention-syria-international-law-inside (discussing these distinctions in the context of the Syrian situation).

have to both demonstrate and engage in cooperative, consensus-building activity. Thus, counterintuitively, arguments justifying state conduct apparently in conflict with a treaty are more likely to reflect the generalized agreement of the international community when based on modification by a new norm of customary international law than when they are based on a new adaptive interpretation.

This Part uses the proposed U.S. unilateral use of force in Syria as a case study to tease out the relative benefits and drawbacks of these different justifications for state action in apparent breach of a treaty obligation. At the outset, it is worth noting that this is an unusual case study: The treaty in question is the U.N. Charter, one of the most constitutive treaties in the international legal order, and one with its own supremacy article.²⁹¹ The provision purportedly modified is Article 2(4)'s prohibition on the threat or use of force, which many believe to be *jus cogens*. If there was ever a high bar for treaty modification by subsequently developed customary international law, this is it.

As a result, and unsurprisingly, most scholars considering this case study—including myself—would agree that the doctrine of humanitarian intervention has *not* modified Article 2(4),²⁹² and so an argument for intervention grounded in modification by subsequently developed customary international law fails. But this actually underscores the normative point of this Article. A state wishing to intervene contrary to the text of Article 2(4) cannot justify its actions as lawful under an adaptive interpretation of Article 2(4) permitting humanitarian intervention—which fails the smile test—or on the claim that subsequently developed customary international law has modified the Charter. However, a state proffering an adaptive interpretation will be more likely to take action, and thus more likely to act contrary to the international consensus, than a state constrained by the need to demonstrate sufficient state practice and *opinio juris sive necessitatis* to justify its claim.

291. U.N. Charter art. 103 (providing that, in the event of a conflict between the Charter and other international agreements, Charter obligations will prevail). However, it is worth noting that Article 103's supremacy announcement does not extend to customary international law. *Cf.* Dinstein, *supra* note 143, at 418 (noting that although “the Charter prevails over any previous inconsistent custom,” it is less clear what the effect of later custom at odds with the Charter would be).

292. See, e.g., W. Michael Reisman, *Present Problems of the Use of Force in International Law*, 72 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 263 (2007), <http://www.justitiaetpace.org/idiF/annuaireF/2007/Reisman.pdf> (“[T]here is no basis for unilateral Humanitarian Intervention in contemporary international law.”); *id.* at 266 (noting that establishing a “general right of Humanitarian Intervention” would be “a radical challenge to settled international law”); Michael Reisman, INSTITUT DE DROIT INTERNATIONAL 25-26 (May 26, 2015), http://www.justitiaetpace.org/idiE/annuaireE/2015/IDI10_Commission_Recent_Cases_of_Humanitarian_Intervention_May_26_2015_wmr.pdf (reconsidering the Commission's conclusions in light of nine subsequent cases and concluding that “while some unilateral actions may have received a degree of informal or post hoc approval, practice indicates that the international community continues to view unilateral Humanitarian Interventions undertaken without the authorization of the United Nations Security Council as presumptively unlawful”).

A. Case Study: Unilateral U.S. Intervention in Syria

Since early 2011, Syria has been embroiled in a devastating internal armed conflict between the Assad regime and assorted opposition forces. On August 21, 2013, rockets carrying the nerve agent sarin struck opposition-controlled or disputed areas of the Ghouta suburbs near Damascus.²⁹³ The Violations Documentation Centre, using internationally accepted norms to verify deaths, established that at least 588 individuals were killed in the attack, including 108 children.²⁹⁴ A preliminary U.S. government assessment estimated that 1,429 individuals were killed, including 426 children.²⁹⁵

Ten days later, President Obama announced that he had determined that “the United States should take military action against Syrian regime targets,” in no small part because the sarin attack made a “mockery of the global prohibition on the use of chemical weapons.”²⁹⁶ Obama also noted that he was “comfortable going forward without the approval of a United Nations Security Council that, so far, has been completely paralyzed and unwilling to hold Assad accountable.”²⁹⁷

Article 2(4) of the U.N. Charter provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”²⁹⁸ The Charter includes two exceptions to this general prohibition: states may take action pursuant to a Security Council resolution or in self-defense.²⁹⁹ In the absence of either exception, Obama’s threatened military action appeared tantamount to an announcement that the United States intended to violate Article 2(4).³⁰⁰

White House counsel Kathryn Ruemmler acknowledged that the Administration’s threatened use of force “may not fit under a traditionally recognized legal basis under international law.”³⁰¹ However, she also stated that, given the situation, it would nonetheless be “justified and legitimate under international law.”³⁰² When pressed on whether the Administration’s position was that such intervention would be “illegal but legitimate”—as NATO’s bombing of Kosovo is famously described³⁰³—as paraphrased by one

293. *Syria Chemical Attack: What We Know*, BBC NEWS (Sept. 24, 2013, 5:46 PM), <http://www.bbc.co.uk/news/world-middle-east-23927399>.

294. *Id.*

295. *Id.*

296. Office of the Press Sec’y, *Statement by the President on Syria*, WHITE HOUSE (Aug. 31, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>.

297. *Id.*

298. *Id.* art 2, ¶ 4.

299. *Id.* arts. 42, 51.

300. Indeed, Obama’s statement was itself a violation, as Article 2(4) prohibits threats of force as well as uses of force. U.N. Charter art. 2, para. 4.

301. Charlie Savage, *Obama Tests Limits of Power in Syrian Conflict*, N.Y. TIMES, Sept. 8, 2013, at A1 (internal quotation marks omitted).

302. *Id.* (internal quotation marks omitted).

303. INDEP. INT’L COMM’N ON KOS., *THE KOSOVO REPORT: CONFLICT, INTERNATIONAL RESPONSE, LESSONS LEARNED* 4 (2000).

commentator, she responded, “[I]t would be legal under international law because of the constellation of factors presented by the situation.”³⁰⁴ The Administration’s otherwise unelaborated legal position sparked a heated legal and policy debate. Many—including Russian President Vladimir Putin in a *New York Times* op-ed—observed that it boiled down to the absurdity that the United States could violate international law to punish Syria for violating international law.³⁰⁵

Due to internal political resistance to intervention and Russia’s diplomatic solution—whereby the Assad regime signed the Convention on Chemical Weapons and agreed to turn over its chemical stockpiles to the Organization for the Prohibition of Chemical Weapons for destruction—the United States did not take its threatened military action. Consequently, the Obama Administration has not provided any further clarification of why it believed such intervention would not violate Article 2(4). But, in the absence of a Charter amendment,³⁰⁶ scholars hypothesizing about the Administration’s possible legal reasoning focus on two main possibilities: one based on adaptive interpretation, and one based on Charter modification by a new norm of humanitarian intervention—in other words, by subsequently developed customary international law.³⁰⁷ The remainder of this Part explores the stakes and implications of these two arguments.

B. Unilateral Adaptive Interpretation

The United Kingdom is the only state to have provided its legal analysis as to why unilateral military intervention in Syria would be lawful.³⁰⁸ Its

304. Charlie Savage, Comment to *White House Counsel Announces Syria Strike Would Not Violate International Law, But Doesn't Explain How*, OPINIO JURIS (Sept. 9, 2013, 5:48 PM), <http://opiniojuris.org/2013/09/09/white-house-counsel-announces-syria-strike-violate-international-law-doesnt-explain> (clarifying Ruemmler’s description of the Obama Administration’s position).

305. Vladimir V. Putin, Opion., *A Plea for Caution from Russia*, N.Y. TIMES, Sept. 12, 2013, at A31; see also Paul Campos, *Striking Syria Is Completely Illegal*, TIME Sept. 5, 2013, <http://ideas.time.com/2013/09/05/obamas-plan-for-intervention-in-syria-is-illegal>.

306. Under a strict reading of Article 2(4), any form of unilateral military intervention—even if for humanitarian purposes—would be lawful only if the Charter was formally amended.

307. Cf. THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 139 (2002) (suggesting that post-Charter state practice suggests either that the Charter’s prohibition on the use of force has been modified by a “graduated reinterpretation” or by the “evolution of a subsidiary adjectival international law of mitigation”); Anthea Roberts, *Legality vs Legitimacy: Can Uses of Force Be Illegal But Justified?*, in HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 179, 196–97 (Philip Alston & Euan Macdonald eds., 2008).

Other possible arguments, usually based on various iterations of self-defense and consent, have been proposed, but by and large these have not gained traction. For an optimistic summary, see Jordan Paust, *US Use of Limited Force in Syria Can Be Lawful Under the UN Charter*, JURIST-FORUM (Sept. 10, 2013, 11:00 AM), <http://jurist.org/forum/2013/09/jordan-paust-force-syria.php>. For more reserved assessments, see Michael N. Schmitt, *The Syrian Intervention: Assessing the Possible International Law Justifications*, 89 INT’L L. STUD. 744 (2013); Kenneth Anderson, *Legality of Intervention in Syria in Response to Chemical Weapon Attacks*, 17 ASIL INSIGHTS (Aug. 30, 2013), <http://www.asil.org/insights/volume/17/issue/21/legality-intervention-syria-response-chemical-weapon-attacks>.

308. See *Chemical Weapon Use by Syrian Regime—U.K. Government Legal Position*, PRIME MINISTER’S OFF. (Aug. 28, 2013), <http://i2.cdn.turner.com/cnn/2013/images/08/29/chemical-weapon-use>

reasoning is best understood as an adaptive, gap-filling interpretation of Article 2(4)'s general prohibition on the unilateral use of force, intended to address the situation where there is great humanitarian need and the Security Council refuses to take remedial action.³⁰⁹

The U.K. statement provides that, "[i]f action in the Security Council is blocked, the UK would still be permitted under international law to take exceptional measures in order to alleviate the scale of the overwhelmingly humanitarian catastrophe in Syria."³¹⁰ These "exceptional measures" would only be permissible where three conditions were met: (1) "there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief"; (2) it is "objectively clear that there is no practicable alternative to the use of force if lives are to be saved"; and (3) "the proposed use of force must be

-by-syrian-regime-uk-government-legal-position.pdf [hereinafter U.K. Statement].

309. Many—including some current and former U.K. officials—describe the U.K. Statement as being grounded in the doctrine of humanitarian intervention. See, e.g., Schmitt, *supra* note 307, at 754 (relying on the U.K. statement as evidence that the U.K. government has "officially embraced the doctrine of humanitarian intervention as providing a legal ground for operations against Syria"); Joshua Rozenberg, *Syria Intervention: It May Not Be Wise, But Using Force May Be Lawful*, GUARDIAN (Aug. 28, 2013, 8:20 AM), <http://www.theguardian.com/law/2013/aug/28/syria-intervention-force-lawful> (quoting Sir Daniel Bethlehem, QC, the former principal legal adviser to the U.K. Foreign Office, as stating that "the UK has been consistent in maintaining the existence of a narrowly defined right to act" in cases of great humanitarian need).

However, the United Kingdom has not clarified whether the understanding that intervention for humanitarian purposes is lawful because it is in keeping with an expansive interpretation of the U.N. Charter or because a new norm of customary international law has modified the Charter. Given this silence, the absence of support for its claim with references to *opinio juris sive necessitatis* or existing state practice, and the United Kingdom's failure to take consensus-building action to build recognition for the new norm, it seems most accurate to characterize the United Kingdom's position as an adaptive interpretation.

Academics have also proposed adaptive interpretations of Article 2(4) to claim that unilateral military intervention in Syria could be lawful. See, e.g., GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 27 (2012) (noting that humanitarian intervention might not violate Article 2(4) "because the purpose is not to affect the territorial integrity or political independence of the state"); Anthony D'Amato, Comment to *Punitive Military Strikes on Syria Risk an Inhumane Intervention*, OUPBLOG (Sept. 2, 2013, 9:19 PM), <http://blog.oup.com/2013/09/syria-us-military-strikes-international-law-pil> ("A unilateral missile strike against Syria in [retaliation] for its use of chemical weapons against its own civilians, is not a use of force against the territorial integrity or political independence of Syria, in the terms of Article 2(4)."); Ian Hurd, *Syria Insta-Symposium: Ian Hurd—On Law, Policy, and (Not) Bombing Syria*, OPINIO JURIS (Aug. 31, 2013, 12:30 PM), <http://opiniojuris.org/2013/08/31/syria-insta-symposium-ian-hurd-dont-bomb-assad-even-legal> (suggesting a "substantive reinterpretation" of the Charter to permit "the use of force on humanitarian grounds in certain extremely grave circumstances"); Harold Hongju Koh, *Syria and the Law of Humanitarian Intervention*, JUST SECURITY (Oct. 2, 2013, 9:00 AM), <http://justsecurity.org/1506/koh-syria-part2> (arguing that Article 2(4) of the U.N. Charter should not be read as prohibiting limited and genuine humanitarian intervention in the face of Security Council deadlock); Paust, *supra* note 307 (noting the "clearly malleable nature of the [Charter's] text").

These arguments echo similar ones made with regard to the Kosovo bombings, which have not been generally accepted by states or the majority of scholars. See Roberts, *supra* note 307, at 185-88 (describing and debunking arguments that unilateral humanitarian intervention would not breach Article 2(4)); Dapo Akande, *The Legality of Military Action in Syria: Humanitarian Intervention and Responsibility to Protect*, EJIL: TALK! (Aug. 28, 2013), <http://www.ejiltalk.org/humanitarian-intervention-responsibility-to-protect-and-the-legality-of-military-action-in-syria/> (describing such interpretations as "strained" and "inconsistent with subsequent practice . . . and also with the drafting history").

310. U.K. Statement, *supra* note 308.

necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose)."³¹¹ It then concludes that all three of these criteria are satisfied with regards to the Syrian crisis.³¹²

As discussed above, interpretations of constitutive treaties like the Charter must be in line with their object and purpose, and new interpretations are only legitimate if accepted by all states parties. The bar is even higher for interpretations which actually seem to work modifications of significant articles, as the U.K. reasoning appears to do. However, given the lack of an authoritative interpreter of the Charter, individual states are free to propose interpretations and act on them. Thus, the United Kingdom could unilaterally intervene in Syria for humanitarian purposes without awaiting international approval of its interpretation.³¹³

The normative issue with such adaptive interpretation is readily apparent: it permits unilateral state action based on an idiosyncratic interpretation, which ultimately might not be acceptable to other states parties to the treaty. If the interpretation is not accepted, the only action other states can take is to protest it. But, by the time other states parties react, the original state may have already taken action based, in good or bad faith, on its idiosyncratic interpretation. If other states parties protest enough, the action may later be determined to be unlawful—but the clock cannot be rolled back, and the state that acted on an unapproved interpretation is unlikely to be punished.³¹⁴

Thus, in a legal system without an overarching independent enforcement authority and where some states are more equal than others, the primary benefit associated with adaptive interpretation—its presumed fidelity to the object and the purpose of the treaty, as described in its text—may not always be reflected in state conduct. Powerful states and rogue states are relatively free to advance and act on “interpretations” of treaties that actually serve their private interests with little fear of consequences. Russia and the United States, among others, have been harshly critiqued for justifying their actions based on such

311. *Id.* Michael Schmitt argues for a possible fourth criterion: “[T]he intervention must be likely to significantly alleviate the suffering to a degree not possible through non-forceful measures.” Schmitt, *supra* note 307, at 754-55.

312. U.K. Statement, *supra* note 308.

313. It did not do so, however, as the U.K. Parliament voted against such intervention. *Syrian Crisis: Cameron Loses Commons Vote on Syria Action*, BBC NEWS (Aug. 30, 2013, 6:13 PM), <http://www.bbc.com/news/uk-politics-23892783>.

314. Violations of international law are rarely formally adjudicated, especially as the ICJ, the primary international tribunal, has jurisdiction only over those states that have accepted its mandatory authority—which does not include China, Russia, the United States, and other major international actors. David A. Koplow, *Indisputable Violations: What Happens When the United States Unambiguously Breaches a Treaty?*, 37 FLETCHER F. WORLD AFF. 53, 54-55 (2013). Additionally, while the U.N. Security Council can resolve certain disputes between states, the Permanent Member’s veto power protects them and their allies from judgment. *Id.* at 55. Finally, the decisions of the “court of world public opinion,” *id.*, are often muddled, biased (as powerful states and their allies are vocal contributors), and less relevant to powerful or isolated states that may care less about reputational costs or sanctions. See Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 253, 340-42 (2011).

“interpretations.”³¹⁵

The United States could rely on a good-faith adaptive interpretation of Article 2(4), like that proposed by the United Kingdom, as justification for unilateral humanitarian intervention. And it might do so with the best of intentions.³¹⁶ But, if it were to do so and if its interpretation were not widely accepted—as is likely to be the case, given the international community’s and international law scholars’ lackluster response to the U.K. statement—the United States would risk perpetuating its reputation as a superpower above the law. Additionally, to the extent such U.S. action encourages other states to base actions on similarly idiosyncratic interpretations, the stability of the international legal system as a whole would be undermined.

C. Consensus-Building Modification by Customary International Law

Numerous scholars argue that unilateral military intervention in Syria would be lawful under the doctrine of humanitarian intervention.³¹⁷ This doctrine is related to, but distinct from, the concept of the Responsibility to Protect (R2P). R2P might be summarized as follows: a state has the primary responsibility for protecting its population from genocide, crimes against humanity, and other such atrocities. However, sometimes the state itself is the perpetrator of these atrocities. In such situations, the international community has an obligation to use the means at its disposal—which might include diplomatic, economic, and even military action—to stop the perpetrator state from harming its civilians. But where R2P requires Security Council authorization for the use of force,³¹⁸ the doctrine of humanitarian intervention

315. See, e.g., Chris Borgen, *Kosovo, South Ossetia, and Crimea: The Legal Rhetoric of Intervention, Recognition, and Annexation*, OPINIO JURIS (Apr. 2, 2014, 8:04 PM), <http://opiniojuris.org/2014/04/02/kosovo-south-ossetia-crimea-legal-rhetoric-intervention-recognition-annexation> (“While Russia deploys legal language, increasingly they are not the concepts of international law as generally accepted. Rather, Russia is building a revisionist conception of international law to serve its foreign policy needs”); Koplow, *supra* note 314, at 55 (“U.S. arguments that waterboarding was not ‘torture,’ for example, or that ‘extraordinary rendition’ was legally permissible, failed the international laugh test.”).

316. See e.g., Koh, *supra* note 309.

317. See, e.g., Jennifer Trahan, *Syria Insta-Symposium: Jennifer Trahan—The Legality of a U.S. Strike on Syria*, OPINIO JURIS (Aug. 31, 2013, 11:00 AM), <http://opiniojuris.org/2013/08/31/syria-insta-symposium-jennifer-trahan-legality-u-s-strike-syria>; *Viewpoints: Is There A Legal Basis For Military Intervention in Syria?*, BBC NEWS (Aug. 29, 2013), <http://www.bbc.com/news/world-23847169> (statements of Geoffrey Robertson and Sigrun Skogly); see also *Humanitarian Intervention in Syria: The Legal Basis*, at iii, PUB. INT’L L. & POL’Y GRP. (July 2012), <http://publicinternationallawandpolicygroup.org/wp-content/uploads/2012/08/PILPG-The-Legal-Basis-for-Humanitarian-Intervention-in-Syria.pdf> (arguing that “the international community—either through a regional coalition or a coalition of the willing—has a right under customary international law to use force in Syria for the limited purpose of stopping atrocity crimes, provided that the force is narrowly tailored to accomplishing this humanitarian goal”).

318. See 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 139 (Sept. 16, 2005) (noting that the international community, as represented through the United Nations, has the responsibility to protect populations from certain atrocities, and that “we are prepared to take collective action, in a timely and decisive manner, through Security Council, in accordance with the Charter” (emphasis added)); see also Mark Kersten, *Syria Insta-Symposium: Mark Kersten—Whose R2P Is It? The Responsibility to Protect Post-Syria*, OPINIO JURIS (Sept. 3, 2013, 2:08 AM), <http://opiniojuris.org/2013/09/03/syria-insta-symposium-mark-kersten-whose-r2p-responsibility-protect-post-syria> (distinguishing between R2P as a

would permit states to take unilateral action to stop an ongoing mass atrocity.³¹⁹ Thus, although they rarely describe it as such, proponents of the doctrine of humanitarian intervention as a justification for intervention in Syria are essentially arguing that a recently arisen customary norm modifies Article 2(4)'s general prohibition on unilateral uses of force.³²⁰

One obvious benefit to relying on the doctrine is that a state is freed from both the verbal gymnastics associated with justifying an adaptive "interpretation" that actually works a modification and from seeking the consent of all states parties to the treaty. Instead of attempting to explain how Article 2(4)'s apparent blanket prohibition on the use of unilateral force without Security Council's authorization was never meant to apply to humanitarian interventions, arguments that treaty obligations have been modified by subsequently developed customary international law need demonstrate only the existence of the new norm.

The drawback for a state relying on this approach, however, is that the desired norm is unlikely to be established customary international law—which is the case with the doctrine of humanitarian intervention. Pre-1945 evidence of humanitarian interventions are largely irrelevant, as the Charter was intended to end all such unilateral policing and place responsibility for such actions with the Security Council.³²¹ And many post-1945 interventions, now cited as evidence of growing consensus around the norm, were primarily grounded in other legal justifications.³²² Nor does NATO's 1999 bombing campaign in Kosovo serve as evidence of an established norm. First, states and scholars at the time emphasized that it was *sui generis* and not intended to serve as legal precedent for future actions.³²³ Additionally, while there are some parallels between the Kosovo and Syrian situations, there are also a number of significant differences: the former Yugoslavia had failed to comply with U.N. Security Council resolutions; the decision to use force was made by a coalition of states with regional ties to the crisis; and it occurred before the World

normative "package of ideals" and a legal doctrine).

319. See Shane Reeves, *To Russia with Love: How Moral Arguments for a Humanitarian Intervention in Syria Opened the Door for an Invasion of the Ukraine*, 23 MICH. ST. INT'L L. REV. 202-204 (2014); see also Eve Massingham, *Military Intervention for Humanitarian Purposes: Does the Responsibility to Protect Doctrine Advance the Legality of the Use of Force for Humanitarian Ends?*, 91 INT'L REV. RED CROSS 803 (2009) (discussing the history of R2P and distinctions between it and the older doctrine of humanitarian intervention).

320. See Reeves, *supra* note 319, at 205 (noting that the doctrine of humanitarian intervention is "generally understood as the same controversial 'third' exception to the rule of nonintervention established in Article 2(4)").

321. See FRANCK, *supra* note 307, at 136 (noting that the possibility of exceptions to the prohibition on the use of force for unilateral humanitarian action was discussed during the drafting of the Charter but not incorporated in its text); Massingham, *supra* note 319, at 818.

322. Roberts, *supra* note 307, at 181; see also Massingham, *supra* note 319, at 810-15 (reviewing pre- and post-Charter interventions arguably for humanitarian purposes, and concluding that there is still no consensus as to its legality as an independent justification for military action).

323. See Jack Goldsmith, *The Kosovo Precedent for Syria Isn't Much of a Precedent*, LAWFARE (Aug. 24, 2013, 8:02 AM), <http://www.lawfareblog.com/2013/08/the-kosovo-precedent-for-syria-isnt-much-of-a-precedent>.

Summit clarified that R2P was lawful only with Security Council approval.³²⁴ Most importantly, the Kosovo intervention was far from generally approved; indeed, the decision to restrict R2P military interventions to actions endorsed by the Security Council “was a deliberate move by states who, far from celebrating the new humanitarianism that the United States and NATO believed they found in the 1999 Kosovo intervention, were gravely worried by it.”³²⁵

To the extent that there is general agreement that the international community has a legal duty to protect citizens from an abusive government, it stops with R2P—and the ability for an individual state to use force to fulfill such a duty remains contingent on Security Council authorization.³²⁶ Thus, the United States cannot justify unilateral military action in Syria under the doctrine of humanitarian intervention.³²⁷

A state seeking to establish new customary international law could nonetheless take action to promote its development. With regard to the case study, the United States could publically recognize the doctrine of humanitarian intervention as a guiding norm and encourage its partners and allies to do likewise. It could seek to develop evidence of *opinio juris sive necessitatis* through a variety of channels. For example, in the face of a deadlocked Security Council, the United States could campaign for a recommendation from the U.N. General Assembly pursuant to the Uniting for Peace resolution.³²⁸ Finally, it could violate its Charter obligations with the purpose of promoting the evolution of the law, ideally with a coalition of other states.³²⁹ Granted, many of these norm-building strategies are politically infeasible, but this—and the fact that the United States itself has not formally recognized the doctrine of humanitarian intervention—highlights a lack of internal and international consensus regarding whether the existence of such a law would be a net benefit or net loss.

While states justifying violations of treaty obligations on the basis of subsequently developed customary international law are freed from the textual chains associated with adaptive interpretations, they are constrained in other,

324. See also *id.* (listing similarities and differences).

325. Anderson, *supra* note 307.

326. See *supra* note 292.

327. See, e.g., Reeves, *supra* note 319, at 224 (“A use of force justified under the concept of humanitarian intervention is a clear violation of the U.N. Charter and is without the force of law”); Akande, *supra* note 309 (“[O]ne would need very strong evidence of acceptance of a customary rule that modifies the prohibition of the use of force in Art. 2(4). We are very far from that.”); Deborah Pearlstein, *Not Even the Brits Can Make the Case Bombing Syria is Lawful*, OPINIO JURIS (Aug. 30, 2013, 10:24 PM), <http://opiniojuris.org/2013/08/30/even-brits-can-make-case-bombing-syria-lawful> (“With great respect to my friends and colleagues who hold a different view, there is no ‘doctrine of humanitarian intervention.’”). But see Schmitt, *supra* note 307, at 753 (“[I]t can be fairly argued that the right has crystallized into customary law over the past decades.”); *id.* at 755 (concluding that the United States could adopt humanitarian intervention as a legal rationale for strikes in Syria).

328. Uniting for Peace, G.A. Res. 377(V), U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (Nov. 3, 1950) (resolving that, should the Security Council fail to act in response to a threat to the peace, the General Assembly may consider the matter and make recommendations to Members for collective measures, “including in the case of a breach of the peace or act of aggression the use of armed force when necessary”).

329. See Nollkaemper, *supra* note 290.

more productive ways. As evidenced by the Syrian example, even the most politically or militarily powerful state cannot rely on this form of modification without significant, credible proof that the new law has been established. No single state, acting alone, can justify actions in violation of treaty obligations as lawfully based on customary international law, as it will need to demonstrate generalized state practice on the subject and some evidence of *opinio juris sive necessitatis*. This will be relatively easy in certain circumstances, as with the Capitulatory or Panama Canal treaties. But where the norm has not yet evolved into customary international law, there are no lawful grounds for claiming that the treaty has been modified. To prove that the desired norm is actually customary international law, the state wishing to act contrary to its treaty obligations will need to engage in cooperative, coalition-building action to convince most—if not all—of the “audience” that the new norm should be customary international law.³³⁰ To the extent other states support the traditional treaty obligation, however, the norm is unlikely to be recognized as a legitimate grounds for taking action in conflict with the treaty obligation. Thus, ultimately, a state grounding its legal justification for an action in conflict with its treaty obligation must respect the international community’s consensus more than a state employing an adaptive interpretation.

D. A Useful Constraint

Why would states elect to argue that a new customary international law norm has developed when doing so might prevent them from taking the action they (purportedly) wish to take? Wouldn’t it be simpler to advance an adaptive interpretation and act on it? As one commentator to this piece noted, this seems akin to trying to scratch an itch on your right ear with your left hand—it’s easier to just use your right hand.

First, states might sometimes prefer creating an international legal obligation as customary international law rather than as a purported adaptive interpretation of treaty law, especially when the former’s design offers competitive advantages.³³¹ One of customary international law’s fundamental characteristics is that, even if it is only generally accepted, it is universally applicable. As alluded to above,³³² it thereby provides a means by which the international legal order can address the holdout problem inherent to any system grounded solely on state consent.³³³ Furthermore, customary

330. Hakimi, *supra* note 41, at 171 (“[T]his is probably the strongest constraint on [customary international law]: for a [customary international law] claim to be effective, it must actually resonate with other actors. Others must be willing to treat the claim as law.”).

331. See Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT’L L. (forthcoming 2016) (manuscript at 6), <http://ssrn.com/abstract=2677300> (providing contemporary examples of situations where “states prefer custom to treaties or soft law based on either its substantive norms or design features”).

332. See Part III.B.4.

333. Cf. Charney, *supra* note 16. Consent theorists rely on the persistent objector doctrine to address this contradiction, but it does not operate effectively in practice. See Helfer & Wuerth, *supra* note 331, at 7–8.

international law is nonnegotiated, which means its norms are not subject to the bargains that undercut the original aims of treaty provisions, domestic legislation, and written soft law.³³⁴ Accordingly, a state might prefer that the doctrine of humanitarian intervention develop as a universally binding, nonnegotiated customary rule than through treaty law or even soft law.³³⁵

Alternatively, states might actually wish to be constrained from acting—or even emphasize that a new customary norm has not developed. It is possible that, notwithstanding a likely good-faith interest in dissuading Assad from engaging in future indiscriminate attacks, the United States might actually not have wanted to recognize a right to unilateral humanitarian intervention. Consider recent history: less than a year after the resolution of the Syrian situation, Russia deployed troops into the Crimean peninsula, ostensibly as a “humanitarian intervention” to protect ethnic Russians in Crimea.³³⁶ Despite his passionate *New York Times* op-ed,³³⁷ President Putin’s defense of the action was “eerily similar to the arguments made by other world leaders for a humanitarian intervention to stop the Syrian Civil War,” lending credence to the longstanding concern that a doctrine of humanitarian intervention “inadvertently opens the door for an aggressive state to invade a weaker neighbor under the pretext of stopping a ‘humanitarian crisis.’”³³⁸ In some cases, such as with regard to Article 2(4), treaty modification may not be desirable.³³⁹

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A state wishing to take action in apparent violation of its multilateral treaty obligations has limited options. Even were it politically feasible, formal amendment and treaty supersession procedures would likely take too long to be useful. Absent that, a state that wishes to act, but act lawfully, is left with a choice between advancing an adaptive interpretation and claiming that the treaty has already been modified by subsequently developed customary international law.

While, doctrinally, adaptive interpretations might appear more in keeping with treaty law’s grounding in consent, in practice the high bar for its legitimacy—the consent of all states parties—actually encourages states to act on unilateral (and possibly illegitimate) interpretations. Meanwhile, notwithstanding the fact that customary international law can arise and modify a treaty without universal state party consent, states wishing to build their

334. Helfer & Wuerth, *supra* note 331, at 11.

335. *Id.* at 31, 33-35.

336. See, e.g., Harriet Torry & Bertrand Bertrand Benoit, *Watchdog Sees No Threat to Ethnic Russians*, WALL ST. J., Mar. 12, 2014, at A10.

337. Putin, *supra* note 305.

338. Shane Reeves & Winston Williams, *The Road from Syria to Ukraine*, 19 ASIL INSIGHTS (JUL. 21, 2015), <https://www.asil.org/insights/volume/19/issue/16/road-syria-ukraine>. But see Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107, 107 (2006) (drawing on empirical studies to “contend that legalizing [unilateral humanitarian intervention] should in important respects discourage wars with ulterior motives”).

339. See, e.g., Oona A. Hathaway & Scott J. Shapiro, Op-Ed, *On Syria, A U.N. Vote Isn’t Optional*, N.Y. TIMES, Sept. 3, 2013, at A23.

arguments around the existence of contrary customary international law are incentivized to engage in cooperative, coalition-building action. Thus, somewhat counterintuitively, arguments based on modification by subsequently developed customary international law may be less destabilizing and spur states to show greater respect for the consensus of the international community.

CONCLUSION

Structural elements of the modern international order increase the likelihood that provisions in multilateral treaties will conflict with subsequently developed customary international law. Amendment, treaty supersession, and the use of additional protocols have long been accepted formal means of updating outdated treaties. However, as these strategies require the explicit consent of all or a majority of states parties, they are of limited use in updating outdated multilateral treaty regimes.

When modification by explicit mutual consent is not an option, adaptive interpretation provides an alternative method of reconciling aging treaty text and subsequent contradictory state action. But while adaptive interpretation can resolve many problems between static texts and subsequent state conduct, it too is limited by the need for state party consent. Nor are words infinitely elastic. As new norms become widely accepted, certain inflexible treaty obligations will appear progressively more absurd or impractical—and proposed interpretations attempting to resolve stark discrepancies between treaty law and state action will appear less plausible and convincing.

Despite much scholarly focus on how treaties might be legitimately updated, surprisingly little attention has been paid to an alternative route of treaty evolution: modification by subsequently developed customary international law. This Article demonstrates that such modification occurs; argues for recognition of its legitimacy as *lex posterior*; and highlights how, when used as a justification for an action apparently in conflict with a treaty obligation, it may result in more consensus-respecting conduct than arguments grounded in traditional, consent-based forms of treaty modification.